No. 92-1516

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IN THE

Supreme Court of the United States

October Term, 1992

MAGNESIUM ELEKTRON, INC.,
Petitioner,

vs.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC. and FRIENDS OF THE EARTH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred by improperly applying the requirements of standing embodied in Article III of the United States Constitution and by failing to follow standing requirements articulated by this Court in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), because they did not require Respondents in a Clean Water Act citizens' suit to (a) show a concrete and particularized actual or threatened injury as a result of Petitioner's conduct; (b) that the alleged injury was fairly traceable to the challenged conduct; and (c) was likely to be redressed by a favorable decision.

RULE 29.1—STATEMENT

Petitioner, Magnesium Elektron, Inc. is a wholly-owned subsidiary of British Alcan Overseas Investments, Limited, an English Company.

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OPINIONS BELOW

The Opinion of the United States District Court for the District of New Jersey granting a permanent injunction against Petitioner, Magnesium Elektron, Inc., and finding that Respondents have Article III standing was issued on January 23, 1992, and became effective by Order dated February 28, 1992. The Opinion is reported at 34 E.R.C. 2077 and 22 E.L.R. 20362 (D.N.J. January 23, 1992) and is reprinted in the Appendix at A3-A29; the Order is set forth in the Appendix at A30-A31.

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the decision of the District Court was issued on December 15, 1992, and is reprinted in the Appendix at A1-A2. Petitioner's Request for Rehearing was denied by Order dated January 8, 1993, and is set forth in the Appendix at A32-A33.

JURISDICTION

Subject matter jurisdiction in the United States District Court for the District of New Jersey was predicated on 33 U.S.C. §1365. An Opinion granting a permanent injunction against Petitioner, Magnesium Elektron, Inc., and finding that Respondents have Article III standing was issued on January 23, 1992 and became effective by Order dated February 28, 1992.

Petitioner timely appealed to the United States Court of Appeals for the Third Circuit in accordance with 28 U.S.C. §1292(a)(1). The Court of Appeals affirmed the judgment of the lower court without a written opinion by Judgment Order dated December 15, 1992. A timely-filed Petition for Rehearing was denied by the Court of Appeals on January 8, 1993.

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1), and in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Article III, Section 2, Clause 1 provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different states;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 505(a) of the Federal Water Pollution Control Act, 33 U.S.C. §1365 (hereinafter referred to as the "Clean Water Act"), provides in pertinent part:

> Citizen Suits
>
> Except as provided in subsection (b) of this section, and section 309(g)(6) any citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

Section 505 of the Clean Water Act is set forth in the Appendix at A34.

STATEMENT OF THE CASE

A. The Facts

Petitioner Magnesium Elektron, Inc. (hereinafter "MEI"), a New Jersey corporation, is a NPDES/NJPDES permit holder which owns and operates a plant in Flemington, New Jersey which produces zirconium compounds used in various applications including antiperspirants. This process produces an effluent which is neutralized and suspended solids are removed, leaving a pure concentrated salt water similar to natural sea water. The effluent is non-toxic. The discharge of the effluent is regulated by NPDES/NJPDES Permit No. NJ0027537 (the "permit") which establishes certain discharge limitations and reporting requirements to the New Jersey Department of Environmental Protection ("NJDEP").

The salt water effluent is first discharged from the plant into receiving ponds as established by the permit, and then into the Wickecheoke Creek. The Creek eventually joins the Delaware and Raritan Canal which runs parallel to the Delaware River. The required monitoring is conducted before the effluent is discharged into the Creek, at various other areas along the path of the Creek, and at one point in the Canal a few hundred yards downstream from the intersection of the Creek, the Canal and the spillway to the River. No other monitoring is required under the permit. The monitoring data is compiled by MEI pursuant to the permit and is reported to the NJDEP on a monthly basis by submission of discharge monitoring reports ("DMRs").

The permit, which expressly *authorizes* MEI to discharge its effluent into the Wickecheoke Creek, imposes specific discharge limitations upon MEI for

various parameters, including total organic carbon ("TOC"), total dissolved solids ("TDS"), total suspended solids ("TSS"), sodium, temperature and oil.

During the time period February, 1984 through July, 1989, various technical violations of the permit were monitored and reported to the NJDEP by MEI. In 1989, the NJDEP initiated an administrative enforcement action against MEI motivated by public criticism of the NJDEP by Respondents[1] for the technical permit violations.[2] On July 26, 1989, Respondents commenced this private citizens suit against MEI under §505 of the Clean Water Act, 33 U.S.C. §1365 seeking civil penalties and a permanent injunction prohibiting MEI from further discharges into the Creek based on the same substantive violations at issue in the administrative action. In this case, MEI did not dispute that "technical" violations of the permit occurred and, accordingly, consented to two Stipulations approved by the trial court.

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[1] The NJDEP had not initiated any enforcement action against MEI prior to 1989, but apparently felt compelled to do so after public criticism by Respondents. It must also be noted that the Administrative Law Judge found all of the violations to be "unintentional."

[2] On July 25, 1989, a civil penalty was assessed against MEI. The penalty assessment was appealed to the Superior Court of New Jersey, Appellate Division, on the ground that the application of the regulations was arbitrary and capricious under the circumstances because they are inconsistent with the objectives of the statute. *See Public Service Electric & Gas Co. v. NJDEP,* 101 N.J. 95, 501 A.2d 125 (1985).

Additionally, years of Creek flow data were compiled by MEI during the excursionary periods to develop a model to more accurately establish permit standards at the discharge pipe. This would eliminate the technical excusions. A new permit embodying these changes has been pending for approximately five years.

On March 6, 1991, Respondents filed a motion for partial summary judgment as to liability and for permanent injunctive relief. MEI opposed the motion on numerous grounds including (1) Respondents' failure to establish irrevocable harm to the environment or themselves, (2) the excursions were unreliable due to the measuring techniques employed by the testing laboratories, and (3) many of the excursions were merely "technical" violations relating to naturally-occurring environmental activities and phenomena. Respondents also filed a motion for declaratory judgment on or about May 17, 1991 requesting an Order that they have standing to maintain this action against MEI. MEI opposed Respondents' motion based, *inter alia*, on the fact that Respondents failed to demonstrate that they suffered any actual or threatened injury fairly traceable to MEI's effluent discharges and, therefore, any alleged injury will not be redressed by a decision favorable to Respondents. MEI also urged the court to withhold decision on standing until an evidentiary hearing was conducted.

On January 23, 1992, the trial court issued its Opinion[3] holding that Respondents have standing to maintain this action although they did not demonstrate any injury in fact traceable to MEI. The court also issued a permanent injunction against MEI prohibiting further discharges into the Wickecheoke Creek. Alcan timely filed a Notice of Appeal from the Order on March 25, 1992, pursuant to 28 U.S.C. §1292(a)(1).[4]

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[3] The district court specifically designated the Opinion as "NOT FOR PUBLICATION". A5.

[4] MEI's Appeal to the Third Circuit on an interlocutory basis resulted from an order of the lower court granting a contested motion for summary judgment on the issues of standing and injunctive relief. MEI immediately appealed because of the extreme costs (approximately $1,000,000 per year) of hauling effluent necessitated by the injunction. Moreover, further events in this case in the lower courts will have no impact on the issue of standing.

The Court of Appeals affirmed the lower court's decision without a written opinion on December 15, 1992. MEI's Petition for Rehearing was denied on January 8, 1993. This Petition is filed pursuant to 28 U.S.C. §1254(1).

B. The Issues

This case involves the fundamental issue of what the requisite elements of Article III standing are in order to maintain a citizens' suit under §505 of the Clean Water Act, 33 U.S.C. §1365. In other words, is injury in fact, causation and redressibility required.

This Honorable Court most recently addressed this issue in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (hereinafter "*Lujan II*"), by stating that, to have standing, private parties in environmental matters *must* satisfy three fundamental elements:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an *injury in fact* an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent', not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be '*fairly traceable* to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.' Third, it must be 'likely', as opposed to merely 'speculative,' that the *injury will be 'redressed* by the favorable decision.'

Lujan II, 112 S. Ct. at 2136 (citations omitted) (emphasis added). The Third Circuit, in affirming the decision of the United States District Court, effectively rejected this Court's construction of the Article III requirements, and failed to comply with the mandates of the Constitution.

Notwithstanding this Court's clear and unequivocal statement as to what is required to meet Article III standing in environmental matters, the Third Circuit determined that a lower, less stringent standard is adequate to confer standing, and has, in its own words at oral argument, reduced standing to a "complete fiction". This results from the fact that Respondents, by their counsel's own admission at oral argument, cannot show any real injury, much less injury caused by any of the permit excursions. Respondents' contention is that, contrary to this Court's explicit statements in *Lujan II* and *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), they are not required to demonstrate injury in fact or causation to satisfy Article III. Rather, Respondents assert, and the Third Circuit agreed, that all that must be shown is that the excursions affect or harm the *kinds of injury* being asserted by the Respondents. Additionally, the Third Circuit refused to require Respondents to demonstrate that MEI's effluent was technically capable of causing the type of harm alleged.

This Court has held that requirements for establishing standing are not general. It has required courts to examine each type of permit violation and each alleged injury to determine whether there is traceability and therefore standing as to each violation. Neither the trial court nor the appellate court examined the exact nature of the alleged injury to Respondents as a result of the excursions, nor did they make a specific determination as to how the alleged injury was fairly traceable to MEI. In other words, the lower courts did not undertake their respective obligations to make the required inquiry into the issues of injury and traceability.

The third element of standing ignored by the Third Circuit is redressibility. Redressibility in this case is impossible. The ecosystem in which Respondents have identified their interest is subjected to more of the allegedly offending effluent as a result of the lower court's injunction, since MEI is now legally discharging all of its effluent into the Delaware River upstream of the area which is the primary location of Respondent's alleged harm. Moreover, the injunction can have no bearing on the thermal impact of MEI's effluent on the Creek since the thermal load, if any, was naturally created by the sun.

The decision of the Third Circuit affirming the lower court's ruling that Respondents have standing in this case as a matter of law clearly conflicts with the United States Constitution and the applicable decisions of this Court and should, therefore, be reversed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT PETITIONER'S WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FAILED TO COMPLY WITH THE STANDING REQUIREMENTS OF INJURY, CAUSATION AND REDRESSIBILITY EMBODIED IN ARTICLE III OF THE CONSTITUTION AND MANDATED BY THIS COURT.

A. The Permit Excursions In This Case Were The Result Of Naturally-Occurring Phenomena And Were Regulatory Anomalies That Were Technically Incapable Of Causing The Harm Alleged.

At the outset, an explanation of the nature of the permit excursions is necessary since they are essential in evaluating the injury, traceability and redressibility requirements for standing as promulgated by this Court. The standing requirements stem from the constitutional requisite of a "case" or "controversy" which limits federal judicial power to cases in which "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). Absent such a showing, standing does not exist.

In this case, Respondents failed to demonstrate the injury, causation and redressibility necessary to confer standing. In order to establish standing, the permit violations at issue must be technically capable of causing the harm alleged. Otherwise, there can be no injury fairly traceable to defendant's conduct capable of being redressed by the court. The nature and composition of the effluent coupled with the technical permit violations in this case demonstrate that they are simply incapable

of causing the injury and harm alleged in the Respondents' affidavits which are reproduced in the Appendix at A35-A47.

The environment is a very complex system. Therefore, regulatory schemes with the most beneficial objectives may be frustrated by the unpredictability of nature. This problem becomes more acute when, like here, the permit regulations are not aimed at some rather unusual chemical discharge such as methleyene chloride, but instead address more innocuous and common materials.

The majority of the excurions at issue in this case do not relate to materials generated in the MEI process. Rather, they relate to natural environmental conditions and phenomena, or measurement anomalies. Specifically, they relate to the impact of the sun naturally warming both the Creek and the effluent, algae growing in the effluent storage ponds as a result of migrating geese dropping fecal matter into the effluent, and momentary overages in salt—the same salt in the ocean and in food—due to the inability to predict mother nature. There were also two questionable oil excursions that were most likely testing errors since they were split samples in which one part showed an excursion while the other part did not. This conclusion is further supported by the fact that no other oil excursions ever occurred.

MEI's zirconium-manufacturing process does not produce heat that could account for the temperature excursions. The excursions resulted from the heating of the effluent by the sun. The permit regulations had been drafted in a manner that unrealistically assumed changes in temperatures based on times of the year. In fact, the differences in minimum temperatures in the regulations could change as much as ten degrees from one day to the next. Unfortunately, mother nature is not

so predictable or accommodating and on a number of occasions it was much warmer than the regulations contemplated. The result was that the effluent storage pond temperature rose; however, the Creek temperature was equally affected by the unusually warm conditions. Thus, the pond water entered the Creek at essentially the same temperature as that of the Creek. Although this resulted in a violation as a technical matter, it had *no impact* on the thermal condition of the Creek and was incapable of causing injury. Ironically, if MEI had artificially cooled the effluent to comply with the regulations, the environmental impact would have been negative due to the thermal change.

The TOC violations were a function of the natural consequences of migratory geese inhabiting the ponds, and measurement anomalies. As mentioned, the MEI process does not involve organic carbon and none is discharged as waste effluent. Accordingly, the MEI process cannot account for the excursions. Any high levels of TOC resulted not from the MEI process, but from geese using the ponds as a natural habitat. The geese fecal matter is organic carbon and acts as a fertilizer. When introduced into the ponds, it precipitated the growth of algae which is not only organic carbon, but a plant that produces rather than eliminates dissolved oxygen.[5] The resulting conditions that existed in the ponds were in essence no different than the rich and verdant conditions that exist naturally in wildlife preserves.[6] The conditions on the MEI site and in its

[5] The TOC parameter was initially included in the permit by the State of New Jersey as a surrogate measure of the availability of dissolved oxygen that could not be directly measured in salt solutions like those of MEI.

[6] Indeed, the conditions existing in MEI's storage ponds are consistent with a national policy to encourage the development of habitats for migratory water fowl promulgated by the Department of Agriculture. *See e.g.* Water Bank Act, Public Law, 91-559 and 96-182.

effluent have achieved the very conditions for which the state had imposed the regulatory parameters in the first instance—a condition which promoted the development of "flora" and "fauna". However, the conditions also resulted in technical violations of the Clean Water Act. The question presented by this case is whether those "technical" violations which could cause no injury to Respondents gives rise to standing.

The salt excursions were the direct result of a timing problem. There was never any question that the total amount of salt that MEI discharged never exceeded what it could have discharged without violation. The problem involved predicting with precision the enormously complex ecosystem in order to put the right amount of effluent into the Creek so when it combined with salt from a thirty square mile drainage area there were no violations. Unlike the usual regulatory standard that simply places limits on the amount of material that can be discharged, the MEI parameter was unusual, since it did not regulate the amount of effluent that MEI could discharge into the Creek directly. Instead, it limited salt concentrations at one point in the Creek four miles downstream of the discharge point, and another point in the Delaware-Raritan Canal eight miles downstream.

From a theoretical point of view this was the perfect regulatory framework: MEI's discharges were scaled to account for other salt inputs such as road salt runoff. The practical application, however, proved far more difficult since excursions could be caused by something other than MEI's discharges. In fact, excursions were recorded by the automatic monitoring equipment at times when MEI was not discharging at all! What makes this even more compelling is the fact that the Respondents stipulated to the accuracy of the technical consequences of these excursions reported in a

September 15, 1981 Limnological Study of the Wickecheoke Creek Ecosystem, and the conclusion was that there was no harm to the ecosystem:

> [A]ny impact which can be perceived does not 'significantly effect propagation of indigenous biota'; does not interfere with biological communities or populations of important species to a degree which is damaging to the ecosystem'; and does not 'interfere with the maintenance of the water quality in a safe and satisfactory condition for wildlife, fish and other aquatic life.' The 'qualification' is that at times it is possible to discern a moderate change in the patterns of dominance of (not the quality of, or the quantity of) microscopic organisms (Aufwuchs) which is related to the presence of the MEI effluent .... [T]his phenomenon is difficult, if not impossible, to relate legitimately any characteristic of the stream community to the presence of the effluent. At no time during this study has there been evidence of any impact whatsoever on the biota at Station 12, targeted as the point where the presence of the effluent is to be monitored to assure compliance with several agreements between the company and agency personnel.

The reporting violations were administrative anomalies rather than substantive violations. They fall into two categories. One type of violation related to the failure to report to the NJDEP because no sample was taken. The sample was not and could not be taken because the discharge stream from which the sample was required to be taken was shut off since the Creek had unexpectedly stopped flowing. A sample could only be obtained and tested if MEI illegally discharged.

Other reporting violations do not result from a failure to report, but instead result from the fact that the effluent discharge operators could not accurately estimate the exact time an excursion might occur. The

operators therefore had to make the best estimate as to whether it was for example, 11:59 p.m. or 12:01 a.m. Subsequent calculations might prove that the operator's estimate was inaccurate and the actual excursion occurred at 12:01 a.m. (technically the next day), and this would be recorded as a reporting violation since it occurred on a day other than that reported. Both of the reporting violations are technical anomalies and have nothing to do with the failure to supply substantive information to the NJDEP.

In short, the record demonstrates that although "technical" violations of the Clean Water Act were reported, the nature of the effluent and the excursions leads to the inescapable conclusion that the excursions neither harmed nor impaired any of the affiants' activities. Notwithstanding these facts and without a thorough analysis of the injury and harm alleged by the affiants or an examination of whether such harm or injury is fairly traceable to the effluent, the lower courts found standing contrary to the requirements of the Constitution and this Court.

II. THERE IS A CLEAR AND IRRECONCILABLE CONFLICT BETWEEN THIS COURT'S STANDARD FOR STANDING AND THAT APPLIED BY THE THIRD CIRCUIT COURT OF APPEALS.

This case was evaluated under a lower threshold for standing than this Court's decision in *Lujan II*, and thus there is a fundamental conflict between this Court's holding as to what is required for Article III standing and the position of the Third Circuit Court of Appeals. In *Lujan II* this Court affirmed a long line of cases which established the following constitutional elements of standing that must be met in an environmental case:

> 1. the plaintiff must have suffered injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;
>
> 2. there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third-party not before the court;
>
> 3. it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

112 S. Ct. at 2136. The party invoking jurisdiction has the burden of establishing these elements. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

Respondents in this case can show none of the requirements for standing as defined by this Court. Moreover, Respondents were not required to meet the well-defined standing requirements because the standards applied by the district court and affirmed by the Third Circuit *reduce* these requirements.

The district court, relying on the Third Circuit's decision in *PIRG v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991) held that a plaintiff bringing a citizen suit under the Clean Water Act need only establish that a defendant has:

> 1) discharged some pollutant in concentrations greater than allowed by its permit;
>
> 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant; and
>
> 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

A13, citing *Powell Duffryn*, 913 F.2d at 72.

This attenuated standard significantly broadens standing and effectively eliminates the injury in fact and redressibility requirements. The Third Circuit's interpretation and application of the constitutional standing requirements contradicts the standards repeatedly articulated by this Court and most recently reaffirmed in *Lujan II*.

The lower courts rejected the notion that there needed to be injury in fact or that it be fairly traceable to MEI's actions. Further, the alleged injuries are not redressed as a result of the decision, but are exacerbated because 100% of MEI's effluent is discharged into the Delaware River where the affiants recreate. The three part test applied by the lower court and affirmed by the Third Circuit did not require a "concrete or particularized" injury, nor does it as a practical matter demonstrate the injury to be fairly traceable to actions of MEI.

The same analysis applies to each of the affiants' allegations of harm. A35-A47. Each of the affiants state that they enjoy certain recreational activities along the

Delaware and Raritan Canal and the Delaware River. None of the affiants state that they use the Wickecheoke Creek for their recreational activities. Rather, all of their activities are along the Canal and the River. These activities include walking, hiking, studying nature, picnicking, boating, skiing and fishing. A35-A47. The affiants state that their enjoyment of these activities is affected to the extent that they know the waterways in or near which they conduct their activities contain pollution. A35-A47.

However, an ideological interest in a matter is not enough for standing. *Sierra Club v. Morton*, 405 U.S. at 739 ("a mere 'interest in a problem,' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient. . ."). Although this Court in *Morton* recognized that harm to aesthetic and recreational interests is sufficient to confer standing, the affiants do not establish *how* any of their activities are affected by MEI's effluent or the violations. Each of the affiants allege only generalized and generic environmental concerns and fears regarding the River and Canal. Therefore, Respondents have failed to allege any concrete or particularized injury as required by this Court. It is insufficient for a plaintiff to allege harm because of a refusal to recreate in waters that are perceived to be polluted. A plaintiff must establish *how* they are injured in order to satisfy the injury requirement. In this case, Respondents' affiants did not and could not allege a particularized injury since MEI's effluent is incapable of harming Respondents or the environment.[7]

[7] In *Sierra Club v. Morton*, the complaint alleged that plaintiffs' enjoyment of Sequoia National Park would be impaired because the proposed ski resort would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park. 405 U.S.

(Footnote continued on following page.)

For example, the affidavit of Chaim Gold submitted by Respondents alleges that he cannot swim in "polluted" waters because it aggravates his psoriasis. A40. These allegations are not tantamount to the injury in fact requirement of Article III. First, complaining about "polluted" water is complaining about a potential universe of pollutants most of which are wholly unrelated to anything contained in MEI's effluent. Second, salt water is a recognized treatment for psoriasis and therefore MEI's effluent is incapable of causing the injury Mr. Gold alleges. Mr. Gold cannot be threatened by an injury that is technically incapable of occurring. Therefore, Mr. Gold has not satisfied the injury in fact requirement. This Court has recognized that "hypothetical" or "conjectural" injuries are insufficient to confer standing. *Lujan II*, 112 S. Ct. at 2136. Mr. Gold's psoriasis cannot be aggravated by anything that MEI discharges. His skin is only exposed to the MEI materials when water skiing in the Delaware River some fifty miles from the MEI discharge into the Creek. There is no doubt that the concentration of the MEI material is insignificant at that point and could have no negative effect on Mr. Gold. Moreover, all of the salt excursions occurred in the Canal and not the River.

The connection of thermal excursions to any injury alleged by Mr. Gold or the other affiants is even more tenuous since the effluent entered the Creek at the same temperature of the Creek. Therefore, the excursions could have no impact on Mr. Gold's skin condition, not to mention the fact that his water-related activities were conducted fifty miles away.

(Footnote continued from preceding page.)

at 734. This Court held that this type of harm may amount to an "injury in fact," but denied standing because plaintiffs failed to show that they would personally be affected. This differs from this case, where Respondents have failed to allege any actual harm they have or could suffer as a result of MEI's discharges.

A similar analysis can be done for TOC. The organic carbon in the effluent is similar to the same organic material present in the waterways in the most pristine state of nature. The MEI TOC would be quite insignificant and, in fact, would be undetectable in the vast volumes of the Delaware downstream.

Nonetheless, the lower courts refused to accept the injury in fact requirement. Moreover, since the matter was presented to the lower court in the context of a motion for summary judgment, it had to construe the evidence in favor of MEI and assume that there was no injury in fact. The lower court refused to acknowledge that the injury in fact standard was relevant; it did not require a statement of particularized injury, but simply held that standing was appropriate for Mr. Gold because he states that he cannot swim in polluted waters due to his psoriasis, although he could swim in the waters if they were clean. A40.

The lower court also rejected the notion of traceability: *i.e.*, was the Respondents' injury in fact caused by the conduct of MEI. The Third Circuit's view is that whether or not the plaintiff's injury was caused by the defendant is irrelevant as long as the pollutant "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Powell Duffryn*, 913 F.2d at 72. This standard was once again reaffirmed by the Third Circuit *sub silentio* in this case. This position conflicts directly with the requirement of this Court that the harm must be a direct result of the defendant's action, not those of a third party. *Lujan II*, 112 S. Ct. at 2136.

The dialogue in the Third Circuit between Respondents' counsel and the panel during oral arguments made it clear that Respondents would not have standing on the facts alleged if they were required

to show that MEI's material, in fact, resulted in their alleged injury. Judge Alito pointed out to Respondents' counsel that his staff had undertaken an effort to quantify the extent of the impact of the MEI salt discharge, and concluded that the impact on the stream was less than discharging some very pricey bottled mineral waters such as "Polinaris".

Judge Alito further questioned Respondents' counsel as to how it could demonstrate any impact of the effluent many miles downstream in the Delaware River. Arguing that it was the purpose of the Clean Water Act to force everyone to "zero discharge" because "pollution is harmful", counsel conceded that Respondents would be unable to demonstrate standing if the more stringent standards had to be met. This Court makes it very clear that if there is no harm in fact, there can be no traceability, and if the defendant who caused the harm is not before the court, then there can never be redressibility. The Respondents are not before the court righting a wrong to them personally, but forcing the court to usurp the role of the executive by undertaking what is in effect an enforcement action.

This is exemplified by Ms. Howat, who claims a concern about her ability to recreate and study nature without defining *how* her interests are affected. A46. The MEI TOC was the natural consequence of a habitat of migrating geese and Ms. Howat would have been exposed to vastly higher amounts of the same materials in Montezuma National Wildlife Preserve or Yellowstone National Park. It is hard to understand how her ability to study nature is impaired.

The result is that if the affiants are really being harmed by some pollution in the waterways, that harm is continuing and this lawsuit is totally irrelevant to that harm. As is obviously the case, the Third Circuit doctrine has permitted persons who are suffering no harm at all to become the vehicles for environmental organizations to implement their political agenda and fund their captive law firms. The Respondents here are attempting to "convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders'," contrary to the mandates of this Court. *Valley Forge, supra*, 454 U.S. at 473, quoting in part *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

III. THIS COURT SHOULD GRANT THIS PETITION BECAUSE THE THIRD CIRCUIT IS FULLY AWARE THAT ITS POSITION IS INCONSISTENT WITH THE CONSTITUTION AND THE POSITION OF THIS COURT AND IT HAS PROMULGATED A CONSTITUTIONAL STANDARD THAT SETS IT APART FROM OTHER CIRCUIT COURTS IN THE COUNTRY.

The lower court's decision relies on the reasoning of the Third Circuit in *Powell Duffryn, supra.* Yet, even in *Powell Duffryn,* the Third Circuit knew that its holding was inconsistent with the constitutional doctrines for standing that had been promulgated by this Court. In a concurring opinion, Judge Aldisert leaves little doubt that the Third Circuit's position in *Powell Duffryn* was a departure from this Court's historical position when he stated:

> I join in the opinion of the court and write separately only to express a nagging doubt about standing.
>
> Throughout my extensive preparation of this case including close attention at argument and discussion with my colleagues at conference, I was persuaded that the member/plaintiffs had failed to show an actual injury that was traceable to the permit violations. I am now willing to join my colleagues' view. But I feel somewhat like Lord Byron's fair maiden in Don Juan, c 1, dedication cxvii,
>
> > A little more she strove, and much repented, And whispering "I will ne'er consent"—consented.

913 F.2d at 83.

In this case, Respondents used the same boilerplate form affidavits that were used in *Powell Duffryn.* However, unlike *Powell Duffryn,* standing was held to

exist on a motion for summary judgment and, therefore, MEI was unable to directly demonstrate insufficiencies of the affidavits. Nonetheless, the Third Circuit accepted those averments even though Judge Aldisert recognized that they were insufficient to meet the requirements of *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) (hereinafter "*Lujan I*"):

> The [United States Supreme] Court insisted that affidavits of the member/plaintiffs show that the "injury [the affiant] complains of (his aggrievement, or the adverse effect upon him) falls within the 'zone of interests' sought to be protected by the statutory provisions whose violation forms the legal bases for his complaint." The Court directed us not to "[assume] that general averments embrace the 'specific facts' needed to sustain" standing. If such are the Court's requirements to prove standing under a statute, it follows, a fortiori, that the Court requires some stringency in meeting Article III standing, the issue before us here. Nevertheless, I still am inclined to find standing. Perhaps my wish to find standing is father to the thought, but in view of *Lujan* [*v. National Wildlife Federation*], I hope it is not, as John Greenleaf Whitter put it, a "wish that failed of act."

913 F.2d at 84 (citations omitted.)

Since Judge Aldisert's comments, this Court has revisited the issue of Article III standing as it relates to environmental cases in *Lujan II*, which explicitly addressed the issue of standing in the context of Article III. *Lujan II* did not reduce the stringency of the standing requirements. On the contrary, it reaffirmed the standards that Judge Aldisert conceded were not met in *Powell Duffryn*, and were clearly not met in this case. The Third Circuit affirmed without a written opinion

because, in MEI's view, there is no way that the Third Circuit can reconcile its decision with the standards that this Court has stated must apply.

The Third Circuit has apparently reached the conclusion that the essential separation of powers which is the hallmark of our form of government and the basis of the standing requirement is not going to apply within the realm of its jurisdiction, and that standing is a mere abstract formality that is satisfied by only a "gossamer case." As this Court clearly stated in *Lujan II*, the Congress may not by statute transfer the authority of the executive to the courts. 112 S. Ct. at 2145.

Further, Congress does not have the authority to override the Constitutional standing requirements. The Third Circuit's position is that citizen-suit plaintiffs have automatic standing wherever there is a permit violation. Indeed, Judge Aldisert noted in his concurring opinion in *Powell Duffryn*, 913 F.2d at 84, his concern "that this enthusiasm has led environmental organizations and citizen plaintiffs to mistakenly believe that they have standing to sue any time a discharge permit is violated." The Third Circuit in *Powell Duffryn* acknowledged that the Clean Water Act confers standing *to the limits of the Constitution*, 913 F.2d at 70 n.3, and yet ignored what this Court has interpreted those limits to be.

In this case, as in *Powell Duffryn*, there is little doubt that the Respondents' organizations have decided that the government's implementation of the Clean Water Act is not consistent with its views as to what serves the public interest. As indicated earlier, Respondents' counsel had expressed their view that no discharge should be permitted and that it is their view that the private citizen suit is the mechanism by which it will seek to obtain that objective by seeking penalties for

activities that cannot be shown to cause harm. This policy of creating the lawsuit and then looking for an injury to justify it is precisely what Judge Aldisert identified in *Powell Duffryn* and clearly what is taking place in this case:

> I see PIRG and FOE in the position of the old-time vaudeville performer's ad in *Variety*: "Have tux, will travel." PIRG and FOE advertised: "Have case, need live-bodied members/plaintiffs." The questions for this court are: Were the recruited live bodies sufficiently injured to sustain this action, or more specifically, was theirs an "injury [that] fairly can be traced to the challenged action," or otherwise stated, did they "show injury in fact resulting from the action which they seek to have the court adjudicate?"
>
> Maybe the wrong plaintiffs were recruited. Or, perhaps the plaintiffs were not sufficiently coached before their depositions. Whatever the case, constitutional standing is a serious question here.

913 F.2d at 84-85 (citation omitted.)

The quesiton of standing is far weaker in this case than *Powell Duffryn*. For example, in *Powell Duffryn*, Judge Aldisert acknowledges that there is injury in fact. Citing Cheryl Cummings and the dismal condition of the Kill Van Kull, Judge Adlisert points out that Ms. Cummings said her enjoyment of the Kill Van Kull Park has been diminished because of "a film" on the water which is "sometimes like a rainbow or sometimes like greenish-yellow." 913 F.2d at 87. In her deposition, Judge Aldisert points out that Ms. Cummings concedes that had the allegations of the lawsuit been explained to her she would not have been able to join it. *Id.*

In this case, the Respondents' affiants never acknowledged the existence of any sign of pollution. In fact, the stipulated facts from the Limnological Study indicated that the impact of the MEI effluent on the Creek was essentially undetectable miles above the closest location that any of the affiants had ever come. Moreover, by resolving the matter on summary judgment based on affiants never disclosed as potential witnesses before the close of discovery, the lower court effectively foreclosed any inspection of the underlying claims. There can be little doubt after the most cursory review of the facts that the Third Circuit has decided that it is unhappy with the actions of the enforcement agencies and has decided that, notwithstanding the proscription of this Court, that it will usurp the role of enforcement.

Although the Third Circuit has attempted to modify its language so the conflict with this Court's decisions and Article III is not so apparent, the conclusion that there is a conflict is inescapable. After reviewing the testimony in *Powell Duffryn* and concluding that there was no link between the alleged injuries and any act of the defendant, Judge Aldisert concluded as follows:

> I believe that the foregoing (absence of traceability) is a fair summary of the evidence of the injuries and the 'injury in fact resulting from the action they seek to have the court adjudicate.' Is it enough? I'm not sure. *Were this not an environment[al] case, it certainly would not be.* I come down on the side of standing with stated qualms that are soothed somewhat by the notion that the evolving precepts of standing are perhaps expanded a bit when at stake are the great public policy considerations of insults to our environment.

913 F.2d at 89 (citation omitted) (emphasis added).

In *Lujan II*, this Court failed to placate Judge Aldisert's qualms and restated the proposition that Article III minimums do not vary with the apparent urgency of the political issue of the moment. Emboldened by what may appear to be insulation from review by this Court, the Third Circuit has approved standing in this case on even more extreme facts than those that troubled Judge Aldisert. District courts in the Third Circuit have been so encouraged by the apparent disregard for Article III requirements that they feel sufficiently secure that they explicitly reject notions that this Court has long held as irreducible minimums. *See e.g., SPRIG v. Hercules, Inc.*, 23 E.R.C. 2081, 2086 (D.N.J. 1986) ("affiants' inability to link the pollution of the river to defendant's activities is irrelevant"); *SPRIG v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1200 (D.N.J. 1985) (holding that Clean Water Act plaintiffs "having standing to sue because the general public interest will benefit". A "personalized showing of redressibility [is] neither appropriate nor necessary.")

In this case, Respondents have not and, indeed, cannot establish a direct and palpable concrete injury traceable to MEI's conduct nor can their alleged injury be redressed by a favorable ruling. Unless this Honorable Court grants this Petition, lower courts will continue to ignore the constitutional requirements and governing rules of law promulgated by this Court. Accordingly, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, Petitioner Magnesium Elektron, Inc. requests that this Honorable Court issue a Writ of Certiorari and reverse the decision of the Third Circuit Court of Appeals in this case.

Respectfully submitted,

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APPENDIX

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(Dated December 15, 1992)

No. 92-5161

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC.; FRIENDS OF THE EARTH; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor-Plaintiff,

v.

MAGNESIUM ELEKTRON, INC.,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
D.C. CIVIL ACTION NO. 89-03193
(HONORABLE JOHN C. LIFLAND)

Argued December 8, 1992

Before: SCIRICA, ALITO and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

/s/ A. J. SCIRICA
Circuit Judge

Attest:

/s/ SALLY MRVOS
Sally Mrvos, *Clerk*

DEC 15 1992

DECISION OF THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

(Decided January 23, 1992)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

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34 ERC 2077

[2078] **Clean Water Act**

National pollutant discharge elimination system—Permits (►115.2505)

Enforcement—Citizen suits—Standing (►115.8020.03)

[1] Citizen groups have standing to bring enforcement action against chemical company that violated Clean Water Act discharge permit requirements, because: (1) affidavits of groups' members showed that excessive pollutant discharges threatened their recreational, health, and environmental interests and that reporting violations hindered efforts to obtain information needed to support research and advocacy work, (2) members' claims will be redressed if court

grants relief requested in suit, (3) interests that groups seek to protect are consistent with organizational purposes of groups, and (4) suit does not require participation of individual group members.

National pollutant discharge elimination system—Permits (► 115.2505)

National pollutant discharge elimination system—Discharge requirements (► 115.2515)

National pollutant discharge elimination system—Monitoring and reporting requirements (► 115.2520)

[2] Chemical company is liable for exceeding limitations for total organic carbon discharges and violating monitoring and reporting requirements in Clean Water Act permit, because: (1) monitoring reports showed that company violated TOC limitations; (2) company failed to show that reported results were caused by actual errors in sample tests; (3) even though company claimed method approved by Environmental Protection Agency for measuring TOC concentrations overstated actual amount of organic carbon in samples, claim is improper where it is effectively challenge to permit terms that may not be raised in context of enforcement action; and (4) company does not dispute that it violated monitoring and reporting requirements.

National pollutant discharge elimination system—Permits (► 115.2505)

Judicial procedure and review—Remedies (► 115.9030)

[3] Federal district court will issue injunction to prevent chemical company from continuing to violate Clean Water Act discharge permit requirements, even

though company already ceased discharging to receiving waters, because: (1) citizen groups showed that company violated permit terms; (2) court finds irreparable harm to public health, fish, and aquatic life will result if excessive discharges are allowed to continue; and (3) history of company's actions and threat that company will resume discharges because of high cost of sending effluent to treatment facility suggest that injunction is necessary.

On motion by citizen groups for declaration that they have standing to bring Clean Water Act suit against chemical company and for partial summary judgment on issue of company's liability for alleged violations of total organic carbon limits in discharge permit; motion granted.

Susan J. McGolrick and Monica Wagner, Wash., D.C., for plaintiffs.

Lawrence Salibra, Cleveland, Ohio, for defendant.

Before John C. Lifland, district judge.

*Full Text of Opinion**

Plaintiffs, Public Interest Research Group of New Jersey ("PIRG") and Friends of the Earth ("FOE") (also referred to collectively as "plaintiffs") move for a declaratory judgment that they have standing to litigate this action, and for partial summary judgment on the issue of liability against defendant Magnesium Elektron, Inc. ("MEI").

* The court designated this opinion as "Not for Publication."

BACKGROUND

Plaintiffs are non-profit corporations which seek injunctive relief and civil penalties for MEI's violations of its National Pollution Discharge Elimination System/[2079] New Jersey Pollution Discharge Elimination System ("NPDES/NJPDES") permit. This permit was issued pursuant to §402(a) of the Federal Water Pollution Control Act, 33 U.S.C. §1342(a), (the "Clean Water Act" 33 U.S.C. §1251 *et seq.*) (hereinafter "the Act"). MEI is a New Jersey corporation engaged in the business of zirconium chemical production.

The Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through strict limits on discharges of pollutants. 33 U.S.C. §1251(a)(1). The Act prohibits all discharges into navigable waters without a permit, which limits the type and concentrations of pollutants that may be discharged. Compliance with the permit is deemed compliance with the Act. 33 U.S.C. §§1342(k) and 1344(p). As a condition of the permit, the permit holder must install and maintain equipment to test its discharges and report the results to the Environmental Protection Agency (or the state agency) on Discharge Monitoring Reports ("DMRs"). 40 C.F.R. §§122.41(j) and 122.48 (1989).

33 U.S.C. §1365 entitled "Citizen Suits" provides:

> (a) Except as provided in subsection (b) of this section . . . any citizen may commence a civil action on his own behalf (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . .

In 1976 the EPA issued to MEI permit number 0027537, which authorized it to discharge limited quantities of pollutants into the Wickecheoke Creek ("the creek"). The permit set forth discharge limitations and monitoring and reporting requirements for various pollutants. The EPA thereafter delegated responsibility for administering the NPDES program to the New Jersey Department of Environmental Protection ("NJDEP"). NJDEP issued to MEI NJPDES permit number 0027537 in 1984, which authorized MEI to discharge limited amounts of pollutants into the creek. *See* Plaintiffs' Exhibit 1. This permit expired on November 30, 1989, and no new permit has been issued as of this date. By law, the expired permit remains in effect until a new permit is issued. N.J.S.A. §52:14B-11, N.J.A.C. §7:14A-2.3.

MEI discharges wastewater into the creek, which flows into the Delaware and Raritan Canal approximately 8.5 miles downstream from MEI's discharge point. The Creek and the Canal are hereinafter referred to collectively as the "waterways". The Delaware and Raritan Canal is part of the Delaware and Raritan Canal State Park. The New Jersey Water Supply Authority draws water from the Canal to supply potable water to several municipalities in New Jersey. Plaintiffs state that the Canal is a source of drinking water for approximately 1,000,000 people in central New Jersey. MEI does not dispute that the Creek and the Canal are used for recreational purposes such as fishing, boating and swimming. Moreover, the land adjacent to the waterways is used for hiking, exhibits and concerts.

MEI has stipulated to liability for violations from 1984 to 1989, including the following: 41 violations of the discharge limitations for total dissolved solids, sodium,

temperature and oil; 76 violations of the monitoring requirements; 4 violations of the reporting requirements; and 2 bypass violations. *See* Plaintiffs' Exhibit 3.[1] This motion involves 27 alleged violations of discharge limitations for Total Organic Carbon ("TOC") and MEI's failure to report and monitor as required by its permit, in violation of §§301, 308 and 402 of the Act. The permit limits TOC discharges to 20mg/liter to be monitored one day per month and reported to NJDEP no later than the 25th day of the month. *See* Plaintiffs' Exhibit 1; and Plaintiffs' Exhibit 5 which lists the TOC violations.

DISCUSSION

I. Standing

PIRG and FOE move for a declaratory judgment that they have standing to litigate this action. An organization has standing where:

> 1) the organization's members would have standing to sue on their own,
>
> [2080] 2) the interests the organization seeks to protect are germane to its purpose, and
>
> 3) neither the claim asserted nor the relief requested requires individual participation by its members.

Public Interest Research Group of New Jersey v. Powell Duffryn, 913 F.2d 64, 70 [31 ERC 1905] (3d Cir. 1990), *citing Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Automobile Workers v. Brock*, 477 U.S. 274 (1986). In *Powell* PIRG and FOE brought suit pursuant to 33 U.S.C. §1365(a) against a permit holder for violations of its operating permit under the

[1] MEI also stipulated to 50 additional violations occurring prior to 1984 which plaintiffs do not pursue because of the statute of limitations.

Clean Water Act. That defendant opposed the plaintiffs' motion for summary judgment on liability, in part, on the basis that PIRG lacked standing. The defendant argued that PIRG's members lacked standing on their own under the first prong of the *Hunt* test. The Third Circuit noted that the Act confers standing to the limits of the Constitution. *Id.* at 70 n.3. The court stated that individual standing requires that a plaintiff show:

> 1) an actual or threatened injury suffered as a result of the conduct of the defendant,
>
> 2) which is "fairly traceable to the challenged action", and
>
> 3) "is likely to be redressed by a favorable decision".

Powell, 913 F.2d at 70, *quoting Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

A. Individual Standing Of Plaintiffs' Members

MEI argues, as did the defendants in *Powell*, that plaintiffs have failed to establish that their members suffered an actual injury that can be traced directly to its discharge of effluents. MEI argues that its violations are "technical" in nature and too minor to contribute to plaintiffs' injuries, and that any pollution of the waterways is caused by other sources, such as the sun and duck droppings. MEI also asserts that plaintiffs have not established that their injuries would be redressed by a favorable decision.

MEI does not dispute any facts concerning plaintiffs' standing. Rather, MEI contests the legal standards by which standing is determined.

1. Actual Injury

In support of their position that they have standing, PIRG and FOE submit affidavits of their members. *See* Plaintiffs' Exhibits 1-5. Plaintiffs' members state that they live nearby and use the affected waterways for recreation, that they avoid eating fish or drinking the water that originates from the waterways due to their pollution, that they rely on PIRG and FOE to protect their interest in the waterways, and that they use the waterways and the surrounding land to hike, fish, boat, study nature and swim. One affiant states that he has high blood pressure which requires him to limit his sodium restriction (an admitted effluent). *See* Exhibit 2 ¶4-6. This affiant also states that he cannot swim in the polluted waters due to his psoriasis, although he could swim in the waters if they were clean. *Id.*

Plaintiffs provide reports which state that excess Total Organic Carbon ("TOC") depletes the amount of dissolved oxygen in the water, which in turn affects the survival of fish and other aquatic life. *See* Plaintiffs' Exhibits 8, 9 and 11 to their Summary Judgment motion. Plaintiffs also provide a report by the New Jersey Department of Environmental Protection which states that the Wickecheoke Creek has been deemed to have "moderately degraded fisheries" due to wastewater discharges. *See* Plaintiffs' Exhibit 12 attached to their Reply Brief on standing.

MEI characterizes the affiants' injuries as "general and generic environmental concerns" which are insufficient to establish a direct injury. The court disagrees. In *Powell* the organizations presented affidavits of their members which stated that they resided in the vicinity or owned property or recreated on

or near the waterway in question. The members stated that they were bothered by the smell and oily sheen of the water and stated that they would boat, fish, or swim in the water if it was cleaner. The Third Circuit held that the members stated sufficient injury to satisfy the Supreme Court's requirement in *Sierra Club v. Morton*, 405 U.S. 727 [3 ERC 2039] (1972) (holding that harm to aesthetic and recreational interests is sufficient to confer standing). *Powell*, 913 F.2d at 71. The *Powell* court noted that the interests at stake need not be large to be cognizable. *Id.*

[1] As in *Powell*, plaintiffs' members have submitted affidavits in which they state that but for the pollution, they [2081] would swim, drink and fish in the affected waterways. Chaim and Elaine Gold, among others, stated that their health has been affected by the excess discharge of sodium and oil. Julie Howat stated that she does not drink the water provided to her from the waterways, nor does she eat fish known to come from these waters, although she would if the water were known to be cleaner. These interests are sufficient under *Powell* and *Morton* to show actual or threatened injury to PIRG's and FOE's members.

Nor does the fact that the members live downstream from MEI's discharge point affect their standing. As Judge Thompson noted in *Public Interest Research Group v. Yates Industries*, 757 F. Supp. 438, 443 [33 ERC 1142] (D.N.J. 1991), "it is enough to show that plaintiffs' members have suffered injuries through waters directly affected by any illegal discharges." To hold otherwise would enable a polluter to "avoid suit by controlling all access to some discrete body of water which flows into another waterway, ensuring that no

potential plaintiff gained access to the actual discharge point, thus giving the polluter free reign to damage downstream points." *Id.*

Plaintiffs also argue that they and their members have suffered injuries as a result of MEI's failure to monitor and report as required by its permit. Plaintiffs assert that the purpose of the monitoring and reporting requirements is, in part, to assist the public in enforcement of the statute. Therefore, MEI's failure to monitor and report as required by its permit prohibited plaintiffs from bringing suit. *See* Plaintiffs' Exhibits 5 and 6. Plaintiffs also argue that due to MEI's failure to monitor and report its discharge levels, plaintiffs were unable to obtain accurate information to conduct research, prepare reports and make proposals and recommendations to the State Legislature, etc. *Id.*

Violations of the Act include failure to monitor or report as required by the permit and courts have permitted citizen suits to enforce the monitoring and reporting aspect of the Act. *See Yates*, 757 F. Supp. at 442 and 448; *Sierra Club v. Simkins Industries, Inc.*, 617 F. Supp. 1120, 1132 [23 ERC 1018] (D.Md. 1985), *aff'd*, 847 F.2d 1109 [27 ERC 1881] (4th Cir. 1988), *cert. denied*, 109 S.Ct. 3185 [30 ERC 1064] (1989); *Menzel v. County Utilities Corp.*, 712 F.2d 91, 94 [19 ERC 2193] (4th Cir. 1983). Therefore, the court concludes that plaintiffs have demonstrated that they are injured by MEI's failure to monitor and report as required by the Act.

2. Fairly Traceable

MEI argues that plaintiffs' injuries are not directly traceable to its violations, claiming *inter alia* that its effluents did not cause the pollution.

The Third Circuit has held that the causation requirement of the second prong of *Valley Forge* does not require plaintiffs to show "to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs". *Powell*, 913 F.2d at 72. Instead, plaintiffs "need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiff's harm". *Id. quoting Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 [11 ERC 1753] (1978). Under the Clean Water Act, this likelihood may be establish by demonstrating that:

> 1) the defendant has discharged some pollutant in concentrations greater than allowed by its permit;
>
> 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant; and
>
> 3) that this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Powell, 913 F.2d at 72.

Plaintiffs assert that they have established discharge of pollutants in concentrations greater than allowed by MEI's permit through MEI's stipulations of liability and its DMRs, which establish discharges in excess of its permit limitations. MEI argues that the violations were "technical" and insufficient to cause plaintiffs' injuries. This identical argument was rejected by Judge Thompson in *Yates*, 757 F. Supp. at 443 (noting that this argument is contrary to the intent of the Act) and Judge Ackerman in the District Court decision in *Powell*, 627 F. Supp. 1074, 1083 (D.N.J. 1986). *See also SPIRG v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1397 [22 ERC 1327] (D.N.J. 1985) ("The effect of the defendant's

argument would be to prohibit any citizens' suits against violators of the FWPCA unless the violation was so great or the waterway so small that the direct impact of the discharges could be pinpointed. This interpretation of the [2082] FWPCA would be directly contrary to its intent.")

Pliantiffs' members have submitted affidavits which establish their interest in the waterways into which MEI discharges its effluents and the effects on their interests. As noted *supra*, plaintiffs provide evidence that the effluents, *inter alia*, threaten (and in fact have already diminished) the aquatic life in the waterways. *See also Yates*, 757 F. Supp. at 443 (excess copper, lead, cadmium and zinc can harm aquatic life). Therefore, plaintiffs meet the second requirements of *Powell*.

Finally, plaintiffs provide evidence that the effluents discharged by MEI cause or contribute to the kinds of injuries alleged by plaintiffs. For example, the excess sodium causes Chaim Gold to avoid drinking the water due to his high blood pressure. The oil discharge prevents Mr. Gold from swimming in the water. The excess TOC causes several of plaintiffs' members to avoid drinking the water and eating fish caught in the waterways.

Plaintiffs also state that MEI's failure to monitor or report its discharge as required by its permit resulted in plaintiffs' inability to have correct figures with which to do research or bring suit to enforce the Act. Citizens depend upon the monitoring and reporting by the permit holder to bring suits to enforce the Act, and without his information plaintiffs' cannot enforce the Act as "private attorneys general". *See Middlesex County Sewerage Authority v. Sea Clammers*, 453 U.S. 1, 17 [16 ERC 1118] (1980). Plaintiffs assert that their subsequent

independent review of MEI's figures established 30 additional violations which plaintiffs were unable to allege in the complaint due to MEI's failure to report them. This injury, if proved, would be traceable to MEI's failure to monitor and report as required by its permit.

3. Redressibility

The last *Valley Forge* test for individual standing is that the plaintiff's injuries are "likely to be redressed by a favorable decision." *Powell*, 913 F.2d at 73, *quoting Valley Forge*, 454 U.S. at 472. The inquiry focuses on the relationship between the plaintiff's injury and the judicial relief sought. *Powell*, 913 F.2d at 73. The court noted that where a plaintiff alleges harm to the water quality because a defendant violated its permit limitations, an injunction would redress the injury by forcing the defendant to comply with its permit. *Id.* The plaintiff "need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III." *Id.*

The *Powell* court went on to note the connection between civil penalties and the injuries to the plaintiffs. "Where Congress has expressly granted a right of action and plaintiffs have shown 'a distinct and palpable injury', plaintiffs 'may invoke the general public interest in support of their claim' ". *Id.*, *quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975). The court also noted that penalties will deter the defendant and other permit holders. *Id. See also Yates*, 757 F. Supp. at 444.

As in *Powell*, the rights of PIRG and FOE members will be redressed by a favorable decision, which would force MEI to comply with its permit. Therefore, the individual members of PIRG and FOE would have a claim that can be redressed by this court.

B. Interests Of The Organization

To determine whether PIRG and FOE have standing to litigate this case, the court must next determine whether the interests that the organizations seek to protect are germane to their purpose. Plaintiffs provide the affidavits of Jeanette Jenkins and Brent Blackwelder (Plaintiff's Exhibits 5 and 6) which state that their organizations conduct research, make recommendations to the legislature, submit comments to the New Jersey DEP concerning the issuance of permits under the Act, and initiate citizen-enforcement suits under the Act. PIRG's and FOE's actions to protect their members' health and recreational, aesthetic and environmental interests in the surrounding waterways and to enforce the Act to obtain cleaner waterways are germane to their purpose as organizations.

C. Individual Participation

The final aspect of the standing test under *Hunt* requires a determination of whether the claims asserted or the relief requested require individual participation by the organizations' members. In this case, as in the redressibility question, plaintiffs seek compliance with the Act, as well as the imposition of civil damages. This relief does not require the individual participation of the members [2083] of FOE or PIRG, since their interests will be served and redressed by a successful outcome of the suit.

Therefore, having met the 3 parts of the *Hunt* test, PIRG and FOE have standing to litigate on behalf of their members.

II. Partial Summary Judgment On Liability

As noted *supra*, MEI has stipulated to liability for all permit violations except TOC.

A. TOC

[2] Plaintiffs assert that they are entitled to summary judgment on liability since they have provided evidence through MEI's own DMRs to establish that MEI exceeded its permit limitations for discharge of TOC. Government-mandated records are treated as party admissions to establish civil liability under the Act. *United States v. Ward*, 448 U.S. 242 [14 ERC 1673] (1980). Thus numerous courts have granted summary judgment on liability based upon violations reported in a defendant's DMR's. *SPIRG v. PD Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1090 [23 ERC 1894] (D.N.J. 1986), *aff'd*, 913 F.2d 64 [31 ERC 1905] (3d Cir. 1990); *Yates*, 757 F. Supp. at 447-8; *SPIRG v. Tenneco Polymers*, 602 F. Supp. 1394, 1400 (D.N.J. 1985); *Sierra Club v. Simkins Industries, Inc.*, 617 F. Supp. 1120 (D.Md. 1985); *SPIRG v. Fritzsche, Dodge & Olcott*, 579 F. Supp. 1528, 1538 [20 ERC 1624] (D.N.J. 1984), *aff'd*, 759 F.2d 1131 [22 ERC 1721] (3d Cir. 1985); *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 452 [22 ERC 1894] (D.Md. 1985); *SPIRG v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1429-30 [23 ERC 1338] (D.N.J. 1985); *PIRG v. GAF Corp.*, D.N.J., Civil Action No. 89-2283, November 20, 1990, slip op. pp. 25-28.

As noted *supra*, a violation of the discharge permit limitations violates the Act. 33 U.S.C. §1311. Courts have held defendants strictly liable for such violations. *PD Oil*, 627 F. Supp. at 1087; *SPIRG v. Georgia-Pacific*, 615 F. Supp. at 1429-30; *Simkins Industries*, 617 F. Supp. at 1128; *Chesapeake Bay*, 68 F. Supp. at 451.

While MEI concedes that DMRs may be deemed admissions for purposes of liability, it asserts that they are not conclusive proof when challenged, citing *Friends of the Earth v. Facet Enterprises, Inc.*, 618 F. Supp. 532 [22 ERC 1143] (W.D.N.Y. 1984). MEI states that its DMRs do not accurately reflect the TOC levels of its discharge because the laboratories performing the tests failed to purge inorganic carbon from the samples, resulting in artificially inflated TOC levels. MEI bases this argument on the affidavit of its former Senior Vice President Glen McIntyre. *See* Defense Exhibit B. McIntyre states that the testing protocol employed by the laboratories erroneously reported both organic and inorganic carbon. *Id.* at ¶¶6 and 7.

Some cases in this Circuit have held that summary judgment cannot be avoided as to liability simply by challenging the accuracy of the data in the DMRs. *PD Oil*, 627 F. Supp. at 1089 (citations omitted). Other courts have held that laboratory error may be used to challenge DMRs to oppose summary judgment, but *only* where the defendant presents direct evidence of errors in the actual tests performed which showed a permit violation. *Yates*, 757 F. Supp. at 447; *Fritzsche*, 579 F. Supp. at 1538; *Tenneco*, 602 F. Supp. at 1400; *SPIRG v. AT & T Bell Lab.*, 617 F. Supp. 1190, 1205 [23 ERC 1201] (D.N.J. 1985). "[I]n light of the strong evidentiary emphasis placed on DMRs, defendant has a heavy burden to establish faulty analysis." *Yates*, 757 F. Supp. at 447. The burden is not met by "speculation" of measurement error. *Id.* Thus, in *Yates* the court found that the defendant's letters outlining its theories of other causes for the discharges were insufficient to create an issue of fact to preclude summary judgment, since the letters did not prove errors which occurred in the actual tests performed. *Id.*

Therefore, the only basis upon which MEI may oppose summary judgment on liability for TOC violations as a matter of law in this circuit is to demonstrate error in the actual tests performed. It has attempted to do this by the aforementioned affidavit of Dr. McIntyre, which states that in his opinion the analytical testing method used by Technion Labs and OBG Labs, Inc., which analyzed its samples from '84-'89, did not accurately reflect TOC in its samples since it erroneously measured total carbon, rather than just organic carbon. *See* Defense Exhibit B at ¶¶5-6.

Plaintiffs provide the deposition of Omar Baturay ("Baturay") the Vice President of Technion (which tested 11 [2084] samples from MEI). *See* Plaintiffs' Exhibit 12. Baturay states that Technion employed a procedure which purged inorganic carbon from MEI's samples. *Id.* at 17-18. Plaintiffs also provide an affidavit by Vincent Pugliese, the Vice President and CEO of Acutest (which tested 2 of MEI's samples). Pugliese states that Acutest likewise employed a test protocol which purged inorganic carbon from samples tested during the period in which Acutest tested MEI's samples. *See* Plaintiffs' Exhibit 13 at pp. 1-2. Both labs employ the "compensation method" approved by the EPA.

MEI's samples were also tested by a third laboratory, OBG, which tested 14 MEI samples at issue in this case. In a letter to McIntyre, David Hill, OBG's Vice President, stated that OBG did not purge inorganic carbon from wastewater samples prior to testing. *See* Defense Exhibit B. However, Hill states in his deposition that OBG employs an EPA-approved method to compensate for inorganic carbon which subtracts the inorganic carbon results from the total carbon results to achieve an organic carbon level. *See* Plaintiffs' Exhibit

14 at 15-18. The EPA considers this method (EPA method 415.1) valid to measure TOC. *See* 40 C.F.R. Part 136 (cited in MEI's permit at p. 3, Part I, section (j)(3)-Plaintiffs' Exhibit 2).

Contrary to MEI's assertions, all the laboratories measuring the samples at issue followed EPA-approved methods to compensate for inorganic carbon and render valid measurements of TOC levels. MEI violated the TOC limitations contained in its permit in samples measured by either method. At oral argument on this issue, MEI's counsel stated that MEI's opposition to summary judgment rests on its belief that the EPA-approved method employed by OBG and Technion overstated TOC levels and was inappropriate for MEI's wastewater sample. Therefore, MEI does not challenge the accuracy of the actual measurements performed, as required by *Yates* and *Fritzsche*. MEI has failed to meet its burden of establishing that the actual tests performed were inaccurate. *See Yates*, 757 F. Supp. at 447. Therefore, summary judgment is appropriate.

MEI opposes summary judgment by asserting that one EPA approved method for measuring TOC levels overstates TOC in its samples. Thus, MEI asks the Court to make a determination that one of the EPA-approved methods for measuring TOC is inaccurate. This is a decision ill-suited for courts.

Moreover, in *Powell* the Third Circuit noted that challenges to the validity of the terms of a defendant's discharge permit are not permitted by §509(b)(2) of the Act, 33 U.S.C. §1369(b)(2). 913 F.2d at 77-78. In *Powell* the defendant had argued that it could not be held liable for its excess discharges since they related only to continuous dischargers, while the defendant was only an

intermittent discharger. The court rejected this claim, noting that §1369 prohibited the court from entertaining the issue, notwithstanding its merits. *Id.*[2] The defendant had had an opportunity to challenge the conditions of its permit through the administrative process and the state court system within 30 days after issuance of the permit, but failed to do so. Hence, the defendant was barred from raising the claim in an enforcement action, since it had "forever" lost the right to do so. *Id.* at 78. Similarly, in *Yates*, Judge Thompson found that the defendant's argument that DEP officials had orally promised that its permit would not be enforced by its terms was, in effect, a challenge to the terms of the defendant's permit, which was prohibited by §1369. 757 F. Supp. at 445-46.

MEI's permit states that test procedures for pollutants, including TOC, shall conform to the methods set forth in regulations promulgated pursuant to §304(g) of the Act. *See* Plaintiffs' Exhibit 1, p. 8 to Brief in Support of Summary Judgment. The regulation enacted pursuant to §304(g) sets forth the two aforementioned EPA-approved methods for measuring TOC. By challenging the EPA-approved method of measuring TOC contained in its permit, MEI is directly challenging its permit. If MEI wished to challenge EPA's standard procedures for measuring TOC as inappropriate for its wastewater, it should have done so within 30 days of the issuance of it permit rather than in the present enforcement action. *See Powell*, 913 F.2d at 78; *Yates*, 757 F. Supp. at 445; *PD Oil*, 627 F. Supp. at 1088.

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[2] §1369(b)(2) provides that challenges to permits issued under the Act "shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

As an alternative basis for opposing summary judgment, MEI states that [2085] there are issues of fact as to whether it caused the high TOC levels. As noted *supra*, a violation of the permit is a violation of the Act. 33 U.S.C. §1311. Any discharge not pursuant to a permit it automatically a violation of the Act. As Judge Ackerman noted in *PD Oil*, Congress has determined what effluent levels are violative of the Act and it is not the court's role to reexamine this issue. 627 F. Supp. at 1083. *Accord NRDC v. Texaco*, 719 F. Supp. 281, 288-89 [30 ERC 1145] (D. Del. 1989), *vacated in part on other grounds*, 906 F.2d 934 [31 ERC 1605] (3d Cir. 1990). As noted in *Tenneco Polymers*, the legislative history of the Act establishes Congress' intent that no lengthy fact-finding occur during enforcement procedures.

> [T]he bill . . . establishes and makes precise new requirements imposed on persons and subject to enforcement. One purpose of these requirements is to avoid the necessity of lengthy fact finding investigations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.

Tenneco Polymers, 602 F.Supp. at 1400, *quoting* S. Rep. No. 414, 92nd Cong., 1st Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3730. Thus, once it has been established that the defendant has discharged a pollutant in excess of its permit levels, unless the defendant can establish that the testing was inaccurate, summary judgment is appropriate. *See Yates; PD Oil; Tenneco; Chesapeake Bay.*

For the aforementioned reasons, summary judgment is appropriate on liability as to the 27 discharges of TOC.

B. Reporting and Monitoring

Plaintiffs assert that MEI failed on five occasions to report violations of the discharge limitations in its permit on its DMRs, which was subsequently discovered by plaintiffs upon examination of MEI's records. Plaintiffs assert that this failure resulted in their inability to assert an additional 30 discharge violations in the complaint.

Plaintiffs assert that MEI failed on 76 occasions to monitor pursuant to its permit, within the time period required by the permit. As a result, they allege that it is impossible to know the level of MEI's discharges at those times, which inhibits plaintiffs' enforcement activities under the Act.

MEI's permit requires it to monitor its discharge once a month and report any violations in its DMRs. *See* Plaintiffs Exhibit 2, p.2, Part I. MEI must certify that the submitted information is "true, accurate, and complete." *Id.* at 3, Part I, section (k)(4). MEI does not oppose plaintiffs' summary judgment motion as it relates to its monitoring and reporting violations. Therefore, summary judgment is appropriate as to these violations.

III. Permanent Injunction

Plaintiffs request a permanent injunction restraining MEI from continuing to violate its permit. Plaintiffs cite cases in which injunctive relief was granted upon a finding that the defendants exceeded the discharge limits in their permits.[3] The Third Circuit, in affirming the permanent injunction entered in *Powell*, narrowed the

[3] For example, *SPIRG v. Monsanto*, 29 ERC 1078 (D.N.J. 1988); *Powell* 1, 720 F.Supp. 1158 (D.N.J. 1989); *PIRG v. Witco Chemical Corp.*, 31 ERC 1571 (D.N.J. 1990); *Yates*, 757 F.Supp. 438, 454-55 (D.N.J. 1991).

scope of the injunction to eliminate injunctive relief against violations of future permits. *Powell*, 913 F.2d at 83. Accordingly, the court will not restrain MEI from violating any new permit. As to the existing permit

> A court may only enter a permanent injunction 'after a showing of both irreparable injury and inadequacy of legal remedies, and a balancing of competing claims of injury and the public interest'.

Powell, 913 F.2d at 82, *quoting Natural Resources Defense Council v. Texaco Refining and Marketing, Inc.*, 906 F.2d 934, 941 (3d Cir. 1990).

A. Success On The Merits

[3] Since the court will grant summary judgment on the 27 TOC violations and the monitoring and reporting violations, plaintiffs have achieved success on the merits.

B. Irreparable Injury

1. Likelihood Of Irreparable Injury

In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987), the Supreme Court stated:

> [2086] Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

In *Texaco Refining* the Court of Appeals for the Third Circuit remanded the case to the district court since it had failed to apply traditional equitable principles to its injunctive relief analysis. However, the Court of Appeals advised the district court that it should bear in mind the aforementioned language in *Amoco*. *Texaco*, 906 F.2d at 94.

Plaintiffs assert that Congress has determined that discharges of pollutants into the nation's waterways in excess of the levels set by the EPA *a fortiori* cause harm. As noted in *Yates*, the purpose of the Act is to reduce the total amount of effluent discharges, and injury occurs when permit limitations on discharges are exceeded. *Yates*, 757 F.Supp. at 454 (citations omitted).

Plaintiffs assert that there is an immediate threat of irreparable injury to aquatic life in the affected waterways, as well as to the health, recreational and aesthetic interests of its members. In support, plaintiffs provide an EPA report which states that the Creek has been affected by the discharges, and EPA reports which detail the harm which results from the various pollutants discharged by MEI. *See* Plaintiffs' Exhibits 12 (in Reply Brief on Standing), 8 and 11 (of initial moving brief).

In the 1990 State Water Quality Inventory Report, the Wickecheoke Creek is described as "moderately degraded" due to wastewater discharges. *See* Plaintiffs' Exhibit 12 at 109, 110 (in Reply Brief on Standing).

MEI has violated its permit discharge levels for total dissolved solids; sodium, temperature, oil and TOC.

An EPA report notes the toxicity of oils to aquatic organisms at levels as low as 1 mg/liter, and the long-term effect of oil pollutants incorporated into sediments in the waterways. *See* Plaintiffs' Exhibit 12 at 210, 211, 219 to Summary Judgment Brief. This report also notes that the fish population is adversely affected at dissolved oxygen concentrations of 4 mg/liter or less. *Id.* at 226. Decreased oxygen levels also affect "aquatic insects and other animals upon which fish feed." *Id.* at 227.

Excess total dissolved solids, particularly sodium sulfate and magnesium sulfate, adversely affect persons suffering from cardiac disease and pregnancy-related toxemia. *Id.* at 394 and 395. Excess dissolved solids also have a deleterious effect on fish and other aquatic life. *Id.* at 397-398. *See* also Plaintiffs' Exhibit 11 to Brief in Support of Summary Judgment, at 1-2; 4-5.

"Increased temperatures accelerate the biodegradation of organic materials . . . which makes increased demands on the dissolved oxygen resources of a given system." Plaintiffs' Exhibit 12 at 423. Fish and other aquatic life are adversely affected by increased temperatures. *Id.* at 425-436.

The aforementioned reports establish harm to aquatic life and the public health when the aforementioned substances are discharged at levels in excess of MEI's permit limitations.

Plaintiffs also assert irreparable injury from MEI's failure to monitor and report pursuant to its permit requirements, in that plaintiffs are unable to research, report their findings to their members or legislative bodies and generally enforce the Act as intended by Congress.

In response, MEI asserts that plaintiffs have failed to demonstrate the likelihood of irreparable harm. In support, MEI provides the affidavit of Kathleen Keating, a Professor of Environmental Sciences. Keating's affidavit states only that in her opinion the "excursions at issue would not result in irreversible changes to the creek environment". *See* Defense Exhibit A at ¶5. The court is wary of Keating's conclusory affidavit, which equates irreparable injury with "irreversible" injury. In *Amoco* the Supreme Court

described irreparable environmental injury as "of long duration". 480 U.S. at 545. Where such injury is sufficiently likely, injunctive relief is generally warranted to protect the environment. *Id.*

MEI further argues that plaintiffs have not shown actual injury to the environment. However, this argument is directly contradicted by the EPA report which found changes in the Creek which affected fish and other aquatic life. *See* discussion *supra.*

[2087] For the aforementioned reasons, there is a likelihood of irreparable injury if MEI is likely to resume discharging its effluent into the waterways.

2. Likelihood Of Resumption Of Discharge

Plaintiffs note that since 1989, shortly after they filed suit, MEI began voluntarily hauling its effluent to the Trenton Sewer Authority. Noting the expense of this procedure, plaintiffs assert that unless an injunction is issued, MEI will return to its former practice of discharging the effluent into the Creek. This is especially true, plaintiffs assert, in light of MEI's statement that it "will resume discharge". *See* Defense Exhibit B.

Economic hardship has been rejected as a basis for denying injunctive relief. *See SPIRG v. Fritzsche, Dodge & Olcott Inc.*, 579 F.Supp. 1528, 1537 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985); *Yates*, 757 F.Supp. at 456. Likewise, the economic cost of compliance is a relevant factor in determining whether resumption of discharge is likely. As noted, MEI has stated its intent to resume discharging into the waterways.

In addition, MEI has failed to report and monitor its discharge levels, as required by the Act. This renders the Act unenforceable as the NJDEP is unable to determine

if MEI is discharging effluents within its permit requirements. *See Sierra Club v. Simkins Industries*, 847 F.2d 1109, 1115 (4th Cir. 1988). MEI has not provided the court with any evidence that establishes that a resumption of discharge will not result in discharge levels in excess of its permit limitations.

Moreover, MEI's history, which includes excess discharges before 1984, prosecution of which is barred by the Statute of Limitations, also supports a conclusion that MEI is likely to resume discharge.

In light of the expense of hauling its effluent, MEI's failure to monitor and report its discharges, and MEI's history, the court concludes that MEI is likely to resume discharging its effluents unless a permanent injunction is issued.

C. Balance Of Harm

Plaintiffs assert that the balance of harm requires the issuance of injunctive relief, since harm to the public health and aquatic life has been demonstrated. *See* Plaintiffs' Exhibits 11 and 12. As noted *supra*, economic hardship in complying with the act does not outweigh the benefit to the community in ensuring compliance with the act. *Fritzsche*, 579 F.Supp. at 1537; *United States v. Ciampitti*, 583 F.Supp. 483, 499 [20 ERC 1926] (D.N.J. 1984). The balance of harm clearly favors the issuance of injunctive relief.

D. Public Interest

The purpose of the Act is to protect the public interest in the integrity of the nation's waters. 33 U.S.C. §1251(a). Therefore, in this case injunctive relief

enjoining MEI from discharging harmful effluents into the waterways is in the public interest. *See Ciampitti*, 583 F.Supp. at 499.

For the aforementioned reasons, the court concludes that a permanent injunction is appropriate to enforce the Act. Plaintiffs' counsel shall submit an appropriate order, consented to as to form.

ORDER OF THE UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

(Filed February 28, 1992)

Civil No. 89-3193

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

HON. JOHN C. LIFLAND

ORDER

Upon consideration of plaintiffs' motions for partial summary judgment as to defendant's liability for violations of its discharge limitation for total organic carbon, for permanent injunctive relief, and for a declaratory judgment that plaintiffs have standing to maintain this action; the arguments of counsel; and the briefs and exhibits submitted by the parties in support or opposition thereto, it is this 28th day of February, 1992,

ORDERED, that plaintiffs' motion for a declaratory judgment that plaintiffs have standing on behalf of themselves and their members to maintain this citizen enforcement action under the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, is granted, and it is further

ORDERED, that plaintiffs' motion for partial summary judgment on the issue of defendant's liability for its TOC discharge violations of the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, and the NPDES/NJPDES permit issued to defendant thereunder, as set forth in Appendix A, attached hereto is granted, and it is further

ORDERED, that plaintiffs' motion for permanent injunctive relief is granted and defendant is hereby enjoined from discharging wastewater from its facility located in Kingwood Township, Hunterdon County, New Jersey, until such time as NPDES/NJPDES Permit No. NJ 0027537, which became effective on December 1, 1984, is superceded by a new permit, and it is further

ORDERED, that defendant shall submit to plaintiffs its discharge monitoring reports (DMRs) and all other documents containing monitoring results, including laboratory reports, within three days of its submission of its discharge monitoring reports (DMRs) to the government regulatory agencies, and it is further

ORDERED, that this case shall proceed to trial on the issue of other appropriate remedies for defendant's violations of the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*

/s/ JOHN C. LIFLAND
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING

(Dated January 8, 1993)

No. 92-5161

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC.; FRIENDS OF THE EARTH; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor-Plaintiff,

v.

MAGNESIUM ELEKTRON, INC.,
Appellant.

(D.C. Civ. No. 89-03193)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and HIGGINBOTHAM*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all

* As to panel rehearing only.

the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ A. J. SCIRICA
Circuit Judge

Dated: January 8, 1993

33 U.S.C.S. §1365

§1365. Citizen suits

(a) Authorization; jurisdiction. Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act [33 USCS §1319(d)].

* * *

PLAINTIFFS' EXHIBIT 1

AFFIDAVIT OF SANDRA SILVERSTONE

Civil No. 89-3193

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

HON. JOHN C. LIFLAND

AFFIDAVIT OF SANDRA SILVERSTON

I, Sandra Silverstone, do hereby affirm and state:

1. I have been a member of both Friends of the Earth and Public Interest Research Group of New Jersey, Inc., (hereafter "NJPIRG") for approximately two years.

2. I reside at 203 Riverview Road, Bridgewater, New Jersey 08807, where I have lived for seven years.

3. I enjoy walking, hiking, and studying nature with my husband and two children along the Delaware and Raritan Canal and the Delaware River in New Jersey between Frenchtown and Lambertville and desire to continue this activity. I also enjoy sightseeing along the

River and the Canal between Frenchtown and Lambertville and visiting the towns and historic sites in this area. My enjoyment of these activities is significantly affected to the extent I know that the waterway along which I am walking, hiking, studying nature, or sightseeing contains pollution.

4. I avoid eating fish caught in the Delaware and Raritan Canal or the Delaware River because I am concerned that those fish might be contaminated with harmful pollutants. I do not believe that it is safe to eat fish caught in these waters at the present time but would eat fish caught in them if the waters were cleaner.

5. I am interested in obtaining correct information about the amount of pollution discharged to Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so I can decide whether to use the waters between Frenchtown and Lambertville and downstream waters. In addition, it is important for me to know how much pollution is in those waters so I can decide whether to eat fish caught there. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

6. One of the reasons I belong to Friends of the Earth and NJPIRG is because I support their activities to protect and improve the waters of New Jersey, including Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River.

7. I believe that it is important for state and federal government agencies to know the amount of pollution discharged into Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so that

government agencies, Friends of the Earth, NJPIRG, and other citizen organizations can bring litigation and take other actions to protect these waters from pollution. Since I hike, study nature, and recreate along the Delaware and Raritan Canal and the Delaware River between Frenchtown and Lambertville and would eat fish caught there if the waters were cleaner, I benefit significantly from these efforts to protect the River and Canal from pollution. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of April, 1991.

/s/ SANDRA SILVERSTONE
Sandra Silverstone

PLAINTIFFS' EXHIBIT 2

AFFIDAVIT OF CHAIM GOLD

Civil No. 89-3193

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

HON. JOHN C. LIFLAND

AFFIDAVIT OF CHAIM GOLD

I, Chaim Gold, do hereby affirm and state:

1. I have been a member of Friends of the Earth for approximately 13 years.

2. I live at 28 Richey Place, Trenton, New Jersey 08618, where I have owned a home with my wife for 15 years. My home is located on the strip of land between the Delaware River and the Delaware and Raritan Canal. I live approximately 200 yards east of the river, 200 yards west of the Canal, and 17 miles downstream of Prallsville, where Wickecheoke Creek enters the Delaware and Raritan Canal and the Delaware River.

3. Every summer for the past 15 years, I have enjoyed boating, fishing, water skiing, and swimming with my wife and friends along the Delaware River between Trenton and Philadelphia. My wife and I own a boat and desire to continue these activities. I also enjoy hiking along the Delaware and Raritan Canal and the Delaware River in Washington Crossing State Park, which is located in New Jersey approximately 7 miles downstream of Prallsville. My enjoyment of these activities is significantly affected to the extent I know that the waterway in which I am boating, fishing, water skiing, or swimming or along which I am hiking contains pollution.

4. I have high blood pressure and, on my doctor's advice, restrict myself to a salt-free diet. The drinking water supply for Trenton and surrounding communities is taken from the Delaware River. Looking out a window of my home, I can see the water intakes for the Trenton water filtration plant, which are located approximately 300 yards downstream from my home. High levels of sodium in my drinking water could seriously effect my health.

5. I know that many other communities in central New Jersey draw their drinking water from the Delaware and Raritan Canal at Lambertville, which is located approximately 4 miles below Prallsville. I also know that the water intakes for the community of Morrisville, Pennsylvania, are located approximately 100 yards downstream of the Trenton water intakes, and the water intakes for Philadelphia are located approximately another 23 miles downstream of the Morrisville intakes. My knowledge of the locations of the various municipal water intakes was gained as a result of my 15-year residence in Trenton, my work as a real estate agent, and

discussions over the years with friends who are active in environmental activities. In addition, I am presently chairman of the Solid Waste Advisory Council in Mercer County and a member of the Mayor's Economic Development Committee in Trenton.

6. I have a skin condition called psoriasis. It is very important to me to be able to continue my boating activities on the Delaware River because sunbathing improves the condition of my skin. I have found that swimming in polluted waters has a detrimental effect on my psoriasis condition, but swimming in very clean waters actually improves the condition of my skin.

7. I am interested in obtaining correct information about the amount of pollution discharged to Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so I can decide whether to use the waters downstream of Prallsville. In addition, it is important for me to know how much pollution is in those waters so I can decide whether to eat fish caught there. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

8. One of the reasons I belong to Friends of the Earth is because I support its activities to protect and improve the waters of New Jersey, including Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River.

9. I believe that it is important for state and federal government agencies to know the amount of pollution discharged into Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so that government agencies, Friends of the Earth, and other

citizen organizations can bring litigation and take other actions to protect these waters from pollution. Since I go boating, water skiing, fishing, and swimming along the Delaware River and hiking along the Delaware and Raritan Canal and the Delaware River downstream of Prallsville, I benefit significantly from these efforts to protect the River and Canal from pollution. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 10 day of May, 1991.

/s/ CHAIM GOLD
Chaim Gold

PLAINTIFFS' EXHIBIT 3

AFFIDAVIT OF ELAINE GOLD

Civil No. 89-3193

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

HON. JOHN C. LIFLAND

AFFIDAVIT OF ELAINE GOLD

I, Elaine Gold, do hereby affirm and state:

1. I have been a member of Friends of the Earth for approximately 13 years.

2. I live at 28 Richey Place, Trenton, New Jersey 08618, where I have owned a home with my husband for 15 years. My home is located on the strip of land between the Delaware River and the Delaware and Raritan Canal. I live approximately 200 yards east of the River, 200 yards west of the Canal, and 17 miles downstream of Prallsville, where Wickecheoke Creek enters the Delaware and Raritan Canal and the Delaware River.

3. Every summer for the past 15 years, I have enjoyed boating, water skiing, fishing, and swimming with my husband and friends along the Delaware River between Trenton and Philadelphia. My husband and I own a boat and desire to continue these activities. I also enjoy hiking along the Delaware and Raritan Canal and the Delaware River in Washington Crossing State Park, which is located in New Jersey approximately 7 miles downstream of Prallsville. My enjoyment of these activities is significantly affected to the extent I know that the waterway in which I am boating, fishing, water skiing, or swimming or along which I am hiking contains pollution.

4. I am interested in obtaining correct information about the amount of pollution discharged to Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so I can decide whether to use the waters downstream of Prallsville. In addition, it is important for me to know how much pollution is in those waters so I can decide whether to eat fish caught there. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

5. One of the reasons I belong to Friends of the Earth is because I support its activities to protect and improve the waters of New Jersey, including Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River.

6. I believe that it is important for state and federal government agencies to know the amount of pollution discharged into Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so that

government agencies, Friends of the Earth, and other citizen organizations can bring litigation and take other actions to protect these waters from pollution. Since I go swimming, boating, water skiing, and fishing along the Delaware River and hiking along the Delaware and Raritan Canal and Delaware River downstream of Prallsville, I benefit significantly from these efforts to protect the River and Canal from pollution. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 10 day of May, 1991.

/s/ ELAINE WALSH GOLD
Elaine Gold

PLAINTIFFS' EXHIBIT 4

AFFIDAVIT OF JULIE HOWAT

Civil No. 89-3193

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC., *et al.*,
Plaintiffs,

v.

MAGNESIUM ELEKTRON INC.,
Defendant.

HON. JOHN C. LIFLAND

AFFIDAVIT OF JULIE HOWAT

I, Julie Howat, do hereby affirm and state:

1. I have been a member of Friends of the Earth for approximately one and a half years.

2. I am 22 years old and have lived in New Jersey all of my life. I now live at 12 Heritage Court, West Trenton, New Jersey 08628, where I have lived for the past 3 years. My home is located approximately 1 mile from the Delaware River and the Delaware and Raritan Canal, and approximately 12 miles downstream of Prallsville, where Wickecheoke Creek enters the Delaware and Raritan Canal and the Delaware River.

3. I enjoy walking, picnicking, and studying nature along the Delaware and Raritan Canal and the Delaware River in the area adjacent to Washington Crossing State Park, which is located approximately 7 miles downstream of Prallsville. My enjoyment of these activities is significantly affected to the extent I know that the waterway along which I am walking, picnicking, or studying nature contains pollution.

4. I avoid drinking water taken directly from the Delaware and Raritan Canal or the Delaware River because I am concerned that the water might be contaminated. I avoid eating fish caught in the Delaware and Raritan Canal or the Delaware River because I am concerned that those fish might be contaminated with harmful pollutants. I do not believe that it is safe to drink water directly from these waters or to eat fish caught there at the present time but would drink water or eat fish caught from them if the waters were cleaner.

5. I am interested in obtaining correct information about the amount of pollution discharged to Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so I can decide whether to use the waters downstream of Prallsville. In addition, it is important for me to know how much pollution is in those waters so I can decide whether to eat fish caught there. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

6. One of the reasons I belong to Friends of the Earth is because I support its activities to protect and improve the waters of New Jersey, including Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River.

7. I believe that it is important for state and federal government agencies to know the amount of pollution discharged into Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River so that government agencies, Friends of the Earth and other citizen organizations can bring litigation and take other actions to protect these waters from pollution. Since I go walking and picnicking along the Delaware and Raritan Canal and the Delaware River downstream of Prallsville and would eat fish caught there if the waters were cleaner, I benefit significantly from these efforts to protect the Canal and River from pollution. If defendant and other dischargers do not monitor and report in accordance with their permits the amount of pollution they discharge, this information will not be available.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of April, 1991.

/s/ JULIE HOWAT 5/1/91
Julie Howat

Supreme Court, U.S.
FILED
APR 29 1993
OFFICE OF THE CLERK

No. 92-1516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MAGNESIUM ELEKTRON, INC.,
Petitioner,

v.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., and FRIENDS OF THE EARTH, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., AND FRIENDS OF THE EARTH, INC., IN OPPOSITION

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**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Court of Appeals for the Third Circuit erred in affirming, without opinion, the determination of the district court that respondents have standing.

PARTIES TO THE PROCEEDINGS

Respondents Public Interest Research Group of New Jersey, Inc., and Friends of the Earth, Inc., are non-profit environmental organizations. Neither corporation has any parent or subsidiary corporations.

Petitioner Magnesium Elektron, Inc., is a wholly-owned subsidiary of British Alcan Overseas Investments, Limited, and an indirect, wholly-owned subsidiary of Alcan Aluminium Limited of Canada.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1516

MAGNESIUM ELEKTRON, INC.,

Petitioner,

v.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., and FRIENDS OF THE EARTH, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENTS PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., AND FRIENDS OF THE EARTH, INC., IN OPPOSITION

Respondents, Public Interest Research Group of New Jersey, Inc. ("NJPIRG"), and Friends of the Earth, Inc. ("FOE"), respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Judgment Order of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

On January 23, 1992, the District Court for the District of New Jersey issued its Opinion granting respondents' motions for a declaratory judgment that they have standing to maintain this action, for partial summary judgment as to liability, and for permanent injunctive relief. Pet. App. A3-A29. The district court implemented the decision by issuing an Order on February 28, 1992. Pet. App. A30-A31.

On December 15, 1992, the Court of Appeals for the Third Circuit issued a Judgment Order summarily affirming the decision of the district court. Pet. App. A1-A2. On January 8, 1993, the court of appeals issued an Order denying petitioner's motion for rehearing. Pet. App. A32-A33.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions set forth in the petition (Pet. 3-4), the following portion of Section 505 of the Clean Water Act, 33 U.S.C. 1365(g), is relevant:

> (g) For the purpose of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

STATEMENT OF THE CASE

This is a citizens' suit under Section 505 of the Clean Water Act, 33 U.S.C. 1365, which sought injunctive relief and civil penalties for petitioner's violations of its National Pollutant Discharge Elimination System ("NPDES") permit for the discharge of pollutants over a period of five and one-half years.

In the district court, respondents filed motions for a declaratory judgment that they have standing to maintain this action, for partial summary judgment as to liability, and for permanent injunctive relief.

The record below shows that petitioner discharged excessive levels of total organic carbon ("TOC"), total dissolved solids ("TDS"), sodium, and oil in violation of the discharge limitations in its permit, exceeded the temperature limitation, and violated the monitoring and reporting requirements on numerous occasions (J.A. 181-188).[1] Petitioner discharges into Wickecheoke Creek, which flows into both the Delaware and Raritan Canal and the Delaware River at Prallsville, New Jersey (J.A. 114-115). Wickecheoke Creek downstream from Green Sergeants Covered Bridge is used primarily for recreational purposes, including fishing and hiking (J.A. 115). The Creek is the largest of 24 tributary streams which feed into the Delaware and Raritan Canal (J.A. 115-116).

Most of the Canal and its adjacent areas are part of the Delaware and Raritan Canal State Park (J.A. 115). Adjacent to the Creek and Canal is the Prallsville Mills Historic District, which contains historic buildings, some of which are used for exhibits, concerts, and community events (*ibid.*). The Canal is used for recreational fishing of numerous species of fish (J.A. 116). The Canal is also a source of drinking water for approximately 1,000,000 people living in the central portion of New Jersey (*ibid.*). The New Jersey Water Supply Authority draws water from the Canal in order to provide potable water to North Brunswick

[1] "J.A." refers to the Joint Appendix filed by the parties in the court of appeals.

Township, Elizabethtown, East Brunswick Township, Middlesex, and the City of New Brunswick (*ibid.*).

The Delaware River and its surrounding areas are used heavily for fishing and other recreational uses (J.A. 435). The River's ecosystem is an important nesting and feeding habitat for many species of fish and birds (*ibid.*). Like the Canal, the Delaware River below Prallsville is a major source of drinking water for residents of both New Jersey and Pennsylvania, including those who live in Trenton and Philadelphia (*ibid.*).

The record below shows that members of NJPIRG and FOE have health, recreational, aesthetic, and environmental interests in the Delaware and Raritan Canal and the Delaware River downstream from petitioner's discharge point (J.A. 415-427). Chaim and Elaine Gold, who are members of FOE, live in Trenton on the strip of land running between the Canal and River (J.A. 418, 422). They own their home, which is located just 200 yards west of the Canal and 200 yards east of the River downstream from the confluence of Wickecheoke Creek and the Canal and River (*ibid.*). The water intakes for their municipal drinking water supply are located in the River 300 yards downstream from their home (J.A. 419). Because Mr. Gold has high blood pressure and is restricted to a salt-free diet, high levels of sodium in his drinking water could seriously affect his health (*ibid.*). Mr. and Mrs. Gold enjoy boating, fishing, water skiing, and swimming along the River between Trenton and Philadelphia (J.A. 418, 422). They also enjoy hiking along the Canal and River in Washington Crossing State Park, which is downstream from the confluence of Wickecheoke Creek and the Canal and River (J.A. 418-419,

422-423). Mr. Gold's psoriasis is aggravated by swimming in polluted waters (J.A. 420). Mr. and Mrs. Gold rely on information about the amount of pollution in the Canal and River in order to decide whether to eat fish caught there (J.A. 420, 423).

Julie Howat, a member of FOE, lives in a northern suburb of Trenton (J.A. 425). Her house is located approximately one mile from the Delaware and Raritan Canal and the Delaware River downstream from the confluence of Wickecheoke Creek and the Canal and River (*ibid.*). Like Mr. and Mrs. Gold, her drinking water supply is taken from the River downstream from petitioner's discharge point (J.A. 419). She enjoys walking, picnicking, and studying nature in the area adjacent to Washington Crossing State Park (J.A. 425). She avoids eating fish caught in the Canal or River because she is afraid of contamination from harmful pollutants but would eat the fish if the waters were cleaner (J.A. 426).

Sandra Silverstone, a member of both NJPIRG and FOE, enjoys walking, hiking, and studying nature along the Delaware and Raritan Canal and the Delaware River between Frenchtown and Lambertville, which are downstream of the confluence of Wickecheoke Creek and the Canal and River, with her husband and two children (J.A. 415). She also enjoys sightseeing along the Canal and River and visiting the towns and historic sites in the area (*ibid.*). She avoids eating fish caught in the Canal or River because she is concerned that it is not safe to do so but would eat the fish if the waters were cleaner (J.A. 415-416).

Respondents also presented evidence from United States Environmental Protection Agency ("EPA")

documents which set forth the harm caused by the pollutants which petitioner has illegally discharged. For example, TOC "is composed of a variety of organic compounds in various oxidation states." *Standard Methods for the Examination of Water and Wastewater*, section 5310 (17th ed. 1989) (J.A. 402). "Some of these carbon compounds can be oxidized further by biological or chemical processes" (J.A. 402). The process of oxidation depletes the amount of dissolved oxygen in the water. Fish cannot survive without sufficient quantities of dissolved oxygen. EPA, *Quality Criteria for Water* (1976)(hereafter "*QCW* (1976)") (J.A. 296-297). EPA states: "Since fish and other aquatic life depend on oxygen for life, the oxygen-demanding wastes must be controlled, or the fish die." EPA, *Primer for Wastewater Treatment* (1980) (J.A. 341). Furthermore, severely low levels of dissolved oxygen "can adversely affect aquatic insects and other animals upon which fish feed." *QCW* (1976) (J.A. 298).

EPA states that dissolved oxygen "generally has been considered as significant in the protection of aesthetic qualities of water as well as for the maintenance of fish and other aquatic life." *QCW* (1976) (J.A. 295). "Dissolved oxygen concentrations are an important gauge of existing water quality and the ability of a water body to support a well balanced aquatic fauna" (*ibid.*). "The aesthetic qualities of water require sufficient dissolved oxygen present to avoid the onset of septic conditions with its attendant malodorous emissions." (*ibid.*).

The record contains evidence showing that in 1990 the New Jersey Department of Environmental Protection and Energy ("NJDEPE") evaluated Wicke-

cheoke Creek, into which petitioner directly discharges, as "moderately degraded * * * because of wastewater discharges" (J.A. 606). NJDEPE noted that "[a]n intensive study on [the Creek's] macroinvertebrate community has found a shift from forms normally present in cold water streams to species tolerant of extremely saline conditions" (J.A. 605).

The record below also shows that the interests of the respondent organizations have been harmed by petitioner's violations of the monitoring and reporting requirements of its permit (J.A. 428-435, 538-541). The record includes affidavits of officials of the respondent organizations showing that they rely on companies to correctly monitor their discharge and report the results to government agencies, where respondents can view the reports (J.A. 428-430, 538-540). This information is essential to respondents' research regarding compliance with water pollution control laws and efforts to protect and improve the quality of the waters, including bringing citizen enforcement suits (J.A. 429-431, 538-540).

The district court examined each of the requirements for standing and concluded that respondents had established their standing as a matter of law. Pet. App. A8-A16. The district court also granted respondents' motion for partial summary judgment as to liability for 27 violations of the TOC discharge limitation in petitioner's permit and granted respondents' motion for permanent injunctive relief to prevent future violations of the permit. Pet. App. A22, A29. Petitioner had previously stipulated to liability for an additional 123 violations of the discharge limitations and monitoring and reporting requirements of its permit. Pet. App. A7-A8. The district

court ordered the case to proceed to trial on the issue of the amount of civil penalties to be assessed against petitioner for its 150 violations of the Act.[2]

In imposing the injunction, the district court found that respondents had "establish[ed] harm to aquatic life and the public health when the aforementioned substances are discharged at levels in excess of [petitioner's] permit limitations." Pet. App. A26. The district court rejected petitioner's argument that respondents had not shown actual injury to the environment, finding that "this argument is directly contradicted by the [NJDEPE] report which found changes in the Creek which affected fish and other aquatic life." Pet. App. A27. The district court found that "there is a likelihood of irreparable injury if MEI [petitioner] is likely to resume discharging its effluent into the waterways" and concluded that "MEI is likely to resume discharging its effluents unless a permanent injunction is issued." Pet. App. A27-A28.

The Court of Appeals, after hearing oral argument, issued a Judgment Order summarily affirming the judgment of the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Fails to Demonstrate Any Conflict between the Decision Below and Any Decision of This Court or Any Court of Appeals

Petitioner argues (Pet. 17):

> This case was evaluated under a lower threshold for standing than this Court's decision in *Lujan II* [*Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992)], and thus

[2] Trial is currently scheduled for November 1, 1993.

> there is a fundamental conflict between this Court's holding as to what is required for Article III standing and the position of the Third Circuit Court of Appeals.

However, the Court of Appeals for the Third Circuit did not issue an opinion. Instead, the court issued a summary affirmance in the form of a Judgment Order. Since the court of appeals issued no opinion, there can be no conflict with this Court or any other court of appeals. Because the court of appeals did not issue an opinion, the petitioner is, in effect, asking this Court to review the opinion issued by the district court. Respondents demonstrate below that there is no conflict between the district court opinion and any decision of this Court or any court of appeals.

2. The Decision of the District Court Is Consistent with the Decisions of This Court and of the Courts of Appeals

The district court's decision relies upon and applies the requirements for Article III standing—injury, causation, and redressability—set forth in *PIRG of NJ v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 70-73 (3d Cir. 1990), certiorari denied, 111 S. Ct. 1018 (1991). Pet. App. A9.

In *Powell Duffryn*, *supra*, 913 F.2d at 70, the court of appeals described the requirements for standing by quoting *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982), in which this Court summarized its earlier precedents:

> [A]t an irreducible minimum, Art. III requires the party who invokes the Court's authority to "show [1] that he personally has

> suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," * * * and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision * * *."

This Court reiterated the identical standing requirements in *Defenders of Wildlife*, *supra*, 112 S. Ct. at 2136.[3]

The district court found that respondents had satisfied each of the three requirements for standing. First, the district court found that respondents had produced affidavits of their members and reports by federal and state environmental protection agencies which demonstrate injury to the interests of their members. Pet. App. A10-A11. The district court also "conclude[d] that plaintiffs ha[d] demonstrated that they [we]re injured by MEI's failure to monitor and report as required by the Act." Pet. App. A12.

Second, the district court analyzed the *Valley Forge* requirement of causation by applying the three-part test for traceability in Clean Water Act cases set forth in *Powell Duffryn* (Pet. App. A13; 913 F.2d at 72):

> 1) the defendant has discharged some pollutant in concentrations greater than allowed by its permit;
>
> 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant; and

---

[3] The district court did not discuss *Defenders of Wildlife* because it had not yet been decided. However, the decision was fully argued in the court of appeals.

> 3) that this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Relying on *Powell Duffryn*, the district court found (Pet. App. A13) that the second prong of the *Valley Forge* test "does not require plaintiffs to show 'to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs.' " 913 F.2d at 72. The district court quoted *Powell Duffryn*, 913 F.2d at 72, which in turn quotes *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n. 20 (1978), for the proposition that plaintiffs "need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiff's harm." Pet. App. A13.

Third, the district court concluded: "As in *Powell*, the rights of PIRG and FOE members will be redressed by a favorable decision, which would force MEI to comply with its permit." Pet. App. A15.

The district court's decision is also in full accord with the decisions of the courts of appeals which have considered the standing of citizen-plaintiffs under the Clean Water Act. See, *e.g.*, *Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 979 (4th Cir. 1992); *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1112-1113, n. 3 (4th Cir. 1988), certiorari denied, 491 U.S. 904 (1989); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985); *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984). For example, in *Simkins*, *supra*, 847 F.2d at 1112, n. 3, plaintiff established standing by showing that one of its members hiked along the river and had been "adversely affected physically, aesthet-

ically and emotionally by [defendant's] failure to comply with its NPDES *permit and resulting illegal* pollution." In *Consolidated Rail, supra*, 768 F.2d at 61, plaintiffs established standing by showing that their members picnicked along the river, fished and swam in the river, travelled near the river, and found the pollution offensive.

Petitioner contends that "Respondents' affiants did not and could not allege a particularized injury since MEI's effluent is incapable of harming Respondents or the environment." Pet. 19. However, respondents submitted evidence showing that the types of pollutants which petitioner discharged in excess of its permit limits have been specifically recognized as harmful to public health and aquatic life by EPA (J.A. 279-329, 353-387).

Petitioner does not contest any of the scientific evidence presented by respondents. Instead, petitioner claims (Pet. 19):

> [T]he affiants do not establish *how* any of their activities are affected by MEI's effluent or the violations. Each of the affiants allege only generalized and generic environmental concerns and fears regarding the River and Canal. Therefore, Respondents have failed to allege any concrete or particularized injury as required by this Court. [emphasis in original]

However, the record shows that the health interests of Chaim Gold, Elaine Gold, and Julie Howat have been harmed by petitioner's illegal discharges of TDS, consisting primarily of salts, because their drinking water is taken from the Delaware River downstream

from petitioner's discharge point (J.A. 419). Excess TDS in drinking water has harmful effects on health because it has laxative effects and adverse effects on patients afflicted with cardiac disease and on women with toxemia associated with pregnancy (J.A. 301, 359). TDS has especially serious effects on people like Mr. Gold who have high blood pressure and are supposed to reduce or eliminate their salt intake (J.A. 301, 359, 419). Mr. Gold's psoriasis is negatively affected by petitioner's discharge of pollutants, such as oil, because he swims in the Delaware River and pollution exacerbates his skin condition (J.A. 420). Excess TOC reduces the availability of dissolved oxygen, creating unpleasant odors (J.A. 295, 402). The affiants' enjoyment of walking, hiking, swimming, boating, fishing, studying nature, and sightseeing in, on, or near the Canal and River downstream of petitioner's discharges are therefore diminished (J.A. 415, 418-419, 422-423, 425). TOC, TDS, oil, and excessive temperature have harmful effects on fish and other aquatic life (J.A. 279-329, 353-387). Two affiants do not eat fish caught in the Canal or River because of the excessive levels of pollutants in those waters to which petitioner has contributed (J.A. 416, 426).

Petitioner's contention that its discharges are incapable of causing harm is also contradicted by the New Jersey 1990 State Water Quality Inventory Report, which describes the water quality and environmental condition of the State's waterways (J.A. 602). The NJDEPE report includes the following assessment of Wickecheoke Creek, into which petitioner directly discharges (J.A. 605):

> Wickecheoke Creek * * * a cold water fishery, is evaluated as moderately degraded. An

> intensive study on this latter stream's macroinvertebrate community has found a shift from forms normally present in cold water streams to species tolerant of extremely saline conditions.

The NJDEPE report goes on to state: "Wickecheoke Creek * * * is considered to have a moderately degraded fisheries, (i.e. partially meeting this designated use), because of wastewater discharges" (J.A. 606).

The area where petitioner discharges its wastewater is a fresh-water ecosystem (J.A. 603). Petitioner's discharge of wastewater high in TDS consisting primarily of salts contributes to the artificially saline condition of Wickecheoke Creek, which in turn affects the aquatic life of the Creek (J.A. 131). Moreover, the saline condition of the Creek affects the condition of the Delaware and Raritan Canal and the Delaware River since the Creek flows into both the Canal and the River (J.A. 115). Petitioner's discharges cause the transformation of a naturally fresh-water environment into an artificially salt-water environment (J.A. 603, 605). Petitioner's own expert admitted that this transformation causes fresh-water organisms to die off and allows salt-water organisms to become dominant (J.A. 409-413).

Petitioner claims "[t]he majority of the excursions at issue in this case * * * relate to natural environmental conditions and phenomena, or measurement anomalies." Pet. 12. Conspicuously absent from petitioner's argument is any evidence in the record to support these assertions. For example, petitioner claims, without evidentiary support, that its temperature violations "resulted from the heating of the

effluent by the sun" (*ibid.*) and that petitioner's wastewater "entered the Creek at essentially the same temperature as that of the Creek" (Pet. 13). Petitioner claims, again without evidentiary support, that its "TOC violations were a function of the natural consequences of migratory geese inhabiting the ponds, and measurement anomalies," rather than from its manufacturing process, and that these forms of organic carbon create oxygen rather than deplete dissolved oxygen in water. *Ibid.*

Petitioner's contention that its illegally high discharges of pollutants are incapable of causing harm is essentially an improper attempt to challenge the validity of the terms of its discharge permit. However, Section 509(b)(2) of the Clean Water Act, 33 U.S.C. 1369(b)(2), provides that a permit "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." In enacting this section, Congress intended to preclude untimely challenges to permit requirements in enforcement proceedings. As the Senate Report states (S. Rep. No. 414, 92d Cong., 1st Sess. 79-80 (1971)):[4]

> An alleged violation of an effluent control limitation or standard would not require reanalysis of technological [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision.

---

[4] Reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, 93rd Cong., 1st Sess., vol. 2, pp. 1497-1498 (1973), 1972 U.S. Code Cong. & Ad. News 3675.

* * *

> Consequently, the factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the courts would be a factual one of whether there had been compliance.

Petitioner also contends that "the alleged injuries are not redressed as a result of the decision, but are exacerbated because 100% of MEI's effluent is discharged into the Delaware River * * *." Pet. 18. As a result of the injunction issued by the district court, petitioner is disposing of its wastewater by hauling it to the wastewater treatment plant of the Trenton Sewer Authority for discharge into the Delaware River at the southern edge of Trenton (J.A. 129-130). Under the Clean Water Act, the Trenton plant can discharge only in compliance with its NPDES permit. 33 U.S.C. 1311(a). There is no evidence in the record which indicates that the Trenton plant is not complying with the discharge limits of its permit. Moreover, petitioner's hauling of its wastewater to Trenton alleviates the harm caused by petitioner's discharge of pollution to Wickecheoke Creek, the Delaware and Raritan Canal, and the Delaware River upstream of Trenton. The harm to respondents' members resulting from their use of the waters and nearby areas upstream of Trenton has therefore clearly been redressed by this injunction.

* * *

Thus, the district court correctly followed the well-established law of this Court. Petitioner points to no specific holdings of the district court which are in conflict with any decisions of this Court or any court

of appeals. Instead, petitioner disputes the application of those legal principles to the facts of this case. The application of correct principles of law by a district court to a particular factual situation does not raise issues for review by this Court.

CONCLUSION

For the foregoing reasons, respondents Public Interest Research Group of New Jersey, Inc., and Friends of the Earth, Inc., submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 29, 1993

BEST AVAILABLE COPY

No. 92-1516

IN THE

Supreme Court of the United States

October Term, 1992

MAGNESIUM ELEKTRON, INC.,
Petitioner,

vs.

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC. and FRIENDS OF THE EARTH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY AND THE NEW JERSEY STATE CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY AND THE NEW JERSEY STATE CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

The Chemical Industry Council of New Jersey ("CIC/NJ") and the New Jersey State Chamber of Commerce (the "Chamber") respectfully move this Honorable Court for leave to file a brief *amici curiae* in this case in support of the Petition for Writ of Certiorari filed by Petitioner Magnesium Elektron, Inc. The Petitioner seeks review of the December 15, 1992 decision of the United States Court of Appeals for the Third Circuit affirming the decision of the United States District Court, District of New Jersey, dated January 23, 1992, both of which are reproduced in the Appendix of Petitioner at A1-A32.

Counsel for Petitioner has consented to the filing of a brief *amici curiae* by the CIC/NJ and the Chamber, and the consent letter is reproduced in the Appendix at A1. Counsel for Respondents Public Interest Research Group of New Jersey, Inc. and Friends of the Earth did not consent to the filing of an *amici curiae* brief.

Amicus CIC/NJ is a trade association comprised of 105 chemical and allied product manufacturers which have facilities throughout the State of New Jersey. CIC/NJ's member companies include bulk and specialty chemical manufacturers, pharmaceutical companies, flavor and fragrance manufacturers, as well as formulators and fabricators. These companies produce a variety of materials used in agriculture, medicine, construction, mining, manufacturing, textiles, and in the cosmetic and food processing industries. The materials and products are used by industry as well as in the home and in protection of the environment. Companies affiliated with CIC/NJ include large operating facilities, small-scale facilities, research and development centers and satellite sales offices. There are approximately

119,000 people in the State of New Jersey who are employed in the chemical industry. Its total shipments are estimated at $20.3 billion annually.

The Chamber serves the business community in the State of New Jersey by providing a vehicle for political action and business advocacy through a network of businesses, local chambers of commerce, and other community organizations. The Chamber was established in 1911 and was intended to serve as a liaison between the public and private sectors and to act as "the voice of business" in New Jersey. The Chamber currently has almost 2,000 members and the various chamber organizations in New Jersey represent over 45,000 businesses. The Chamber supports measures designed to safeguard the state's environment that are rooted in sound science and technology. The Chamber is committed to presenting New Jersey as a good place in which to work and to do business. However, the Chamber recognizes that in order to advocate the advantages of conducting business in the state, there must be realistic laws and governmental policies that will encourage private industry to expand its facilities or relocate to New Jersey.

Environmental laws and regulations have and will continue to have a profound impact on the state's economy. Thus, environmental issues will remain a priority of *amici*. Many environmental laws and regulations depend on inexact regulatory standards. *Amici* believe that regulatory standards should be based on known health effects, impact on the environment and common sense.

The fundamental issue raised by the Petition for Writ in this case is the scope of the constitutional standing requirements applicable to citizen suit plaintiffs under section 505 of the Federal Water Pollution Control

Act, 33 U.S.C. §1365 (hereinafter the "Clean Water Act"). The United States Court of Appeals for the Third Circuit adopted a reduced standard for standing in Clean Water Act cases that allows a section 505 plaintiff to establish standing based solely on a showing of a violation of a defendant's National Pollution Discharge Elimination System/New Jersey Pollution Discharge Elimination System ("NPDES/NJPDES") permit, without a demonstration that plaintiff suffered any injury or that the alleged injury was caused by the defendant's conduct.

Amici are directly interested in this case because the Court of Appeals' misinterpretation of constitutional standing requirements for Clean Water Act citizen suits greatly expands citizens' entitlement to bring suit under the Clean Water Act as well as other environmental statutes. Moreover, the Court of Appeals' refusal to follow the "irreducible constitutional minimum" requirements for standing as set forth in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) subjects *amici* and its members to protracted litigation even when there is no injury in fact.

The issues raised by the instant Petition for Writ of Certiorari directly affect *amici* and raise important questions regarding constitutional requirements for standing. This is true not only because *amici* and their members are subject to regulation under the Clean Water Act and private enforcement actions under section 505, but also because the Court of Appeals' decision may impact similar enforcement suits under a number of other environmental statutes. The decision below seriously prejudices *amici* by announcing a standard of broad applicability that would permit litigation by persons who, under the standards previously applied by this Court, would not have standing to sue.

In the accompanying brief, *amici* address these broad issues. *Amici* do so from the perspective of diverse organizations and industrial entities whose concerns regarding the decision below transcend this case. *Amici* believe that they can effectively contribute to the Court's understanding of the broader ramifications of the Court of Appeals' decision.

In view of the foregoing, *amici* the Chemical Industry Council of New Jersey and the New Jersey State Chamber of Commerce respectfully request that they be permitted to file the accompanying brief *amici curiae* in support of Petitioner.

Respectfully submitted,

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No. 92-1516

IN THE

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PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC. and FRIENDS OF THE EARTH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF THE CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY AND THE NEW JERSEY STATE CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER

Amici curiae, the Chemical Industry Council of New Jersey ("CIC/NJ") and the New Jersey State Chamber of Commerce (the "Chamber"), support the Petition for Certiorari of Magnesium Elektron, Inc., and respectfully request this Honorable Court to issue a writ of certiorari. *Amici* believe that the Third Circuit's decision in this case, which affirmed the decision of the United States District Court for the District of New Jersey without a written opinion, incorrectly interprets and applies the requirements for standing embodied in Article III, §2, Clause 1 of the United States Constitution. *Amici* further believe that the lower court opinion ignores this Court's decisions which define the appropriate standards for standing in environmental cases. In other words, the Third Circuit substantially reduced the "irreducible constitutional minimum" of standing articulated in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

Counsel for Petitioner has consented to the filing of this brief. See Appendix p. A1. Respondents have not consented and, therefore, *amici* have submitted this brief with a Motion for Leave to File a Brief *Amici Curiae* pursuant to Supreme Court Rule 37.2.

I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus the CIC/NJ is a trade association comprised of 105 chemical and allied product manufacturers which have facilities throughout the State of New Jersey. CIC/NJ's member companies include bulk and specialty chemical manufacturers, pharmaceutical companies, flavor and fragrance manufacturers, as well as formulators and fabricators. These companies produce a variety of materials used in agriculture, medicine, construction, mining, manufacturing, textiles, and in the cosmetic and food processing industries. The materials and products are used by industry as well as in the home and in protection of the environment. Companies affiliated with CIC/NJ include large operating facilities,

small-scale facilities, research and development centers and satellite sales offices. There are approximately 119,000 people in the State of New Jersey who are employed in the chemical industry. Its total shipments are estimated at $20.3 billion annually.

Amicus the Chamber of Commerce serves the business community in the State of New Jersey by providing a vehicle for political action and business advocacy through a network of businesses, local chambers of commerce, and other community organizations. The Chamber was established in 1911 and was intended to serve as a liaison between the public and private sectors and to act as "the voice of business" in New Jersey. The Chamber currently has almost 2,000 members and the various chamber organizations in New Jersey represent over 45,000 businesses. The Chamber supports measures designed to safeguard the state's environment that are rooted in sound science and technology. The Chamber is committed to presenting New Jersey as a good place in which to work and to do business. However, the Chamber recognizes that in order to advocate the advantages of conducting business in the state, there must be realistic laws and governmental policies that will encourage private industry to expand its facilities or relocate to New Jersey.

Environmental laws and regulations have and will continue to have a profound impact on the state's economy. Thus, environmental issues will remain a priority of *amici.* Many environmental laws and regulations depend on inexact regulatory standards. *Amici* believe that regulatory standards should be based on known health effects, impact on the environment and common sense.

The issues raised by Magnesium Elektron, Inc.'s Petition for Writ of Certiorari are of serious concern and consequence to *amici* because, like Petitioner, many of their member companies and affiliates are regulated

under the Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387 (hereinafter the "Clean Water Act"). The fundamental issue raised by the Petition concerns the requisites for a plaintiffs' standing to bring a citizens' suit pursuant to section 505 of the Clean Water Act, 33 U.S.C. §1365. The United States Court of Appeals for the Third Circuit affirmed a standard which does not require section 505 plaintiffs to establish injury in fact or causation in order to have standing. That is, a plaintiff need show only that there was a discharge permit violation which caused or contributed to some general concern about pollution. As a result, the Third Circuit's standard for citizen suit standing violates the principles embodied in Article III of the Constitution, and is inconsistent with this Court's well-established requirements for standing. The Court of Appeals' decision significantly broadens the scope of standing in Clear Water Act cases and subjects environmentally inoffensive companies to increased litigation and massive liability for permit violations which do not and can not cause any real harm to plaintiffs or to the environment.

The Third Circuit's decision will also adversely affect *amici's* members in that it will discourage new businesses from relocating to the area within the Third Circuit's jurisdiction and will impede the growth of industry and business already in the area. This decision makes the environmental permitting process more complex and will operate as a disincentive to engage in innovative activities which may have unpredictable but innocuous results. Moreover, the decision puts companies within the jurisdiction of the Third Circuit at a competitive disadvantage with companies located in other circuits as well as in the international economy. In addition, it will interfere with the flexibility and discretion in the relationship between business and government by inserting into the regulatory process an unlimited number of private regulators who are not

responsible to the electorate. These unelected legislators will effect public policy based on personal interests rather than the public good.

The lower courts' decisions seriously prejudice *amici* and their members. *Amici* are not just concerned about the impact of the Third Circuit's decision on the doctrine of individual standing. As business organizations that from time to time advocate the interests of their members, CIC/NJ and the Chamber are also concerned about what these less stringent requirements mean for "associational" standing. Because of the symbiotic relationship between individual and associational standing, any reduction in standing requirements for individual members necessarily makes it easier for an association to file suit on their behalf. By substituting mere permit violations for demonstrations of injury in fact, the Third Circuit has substantially reduced the showing an individual must make in order to file a citizen suit under the Clean Water Act. *Amici* find this reduction in Article III's "irreducible constitutional minimum" particularly disturbing because the exception from Article III's strict standing requirements the Third Circuit appears to have created for environmental groups is an exception neither the Third Circuit nor Congress has any authority to create. The fact that citizen suit provisions can be found in nearly every environmental statute serves only to compound *amici's* concern.[1] *Amici* therefore request this Honorable Court to grant the Petition for Writ of Certiorari.

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[1] *See, e.g.*, Clean Air Act, 42 U.S.C. §7604 (Supp. 1991); Clean Water Act, 33 U.S.C. §1365 (1988); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9659 (1988); Endangered Species Act, 16 U.S.C. §1540(g) (1988); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §1415(g) (1988); Noise Control Act, 42 U.S.C. §4911 (1988); Outer Continental Shelf Lands Act, 43 U.S.C. §1349 (1988); Resource Conservation and Recovery Act, 42 U.S.C. §6972 (1988); Safe Drinking Water Act, 42 U.S.C. §300j-8 (1988); Surface Mining Control and Reclamation Act, 30 U.S.C. §1270 (1988); Toxic Substances Control Act, 15 U.S.C. §2619 (1988).

II. REASONS FOR GRANTING THE WRIT

Standing and the other justiciability requirements derive from the "case" or "controversy" limitation contained in Article III of the United States Constitution. This requirement limits federal judicial power to questions presented in an adversary context, capable of judicial resolution. *Flast v. Cohen*, 392 U.S. 83, 101 (1968). That "justiciability" requirement is essential to the separation of powers which is a hallmark of our form of government. As this Court has said, case or controversy doctrines are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

This Court has stated that the "Article III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines." *Allen v. Wright*, 468 U.S. at 750. Standing generally requires that a plaintiff have a sufficient stake in the outcome of the suit. *Baker v. Carr*, 369 U.S. 186, 204 (1962). The standing doctrine is well-established and is a combination of constitutional requirements and prudential considerations.

A. Petitioner's Writ Of Certiorari Should Be Granted Because The Third Circuit Failed To Comply With The Mandates Of The United States Supreme Court.

This Court recently reaffirmed the traditional constitutional standing requirements in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992), where it stated:

> [T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally-protected interest which is (a) concrete and

> particularized, and (b) 'actual and imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

(Citations omitted.) In direct contravention of these principles, the Court of Appeals' decision in this case eliminates these "irreducible constitutional minimum" requirements by allowing Respondents to maintain this action despite the fact that they have suffered no cognizable injury traceable to the permit excursions. Further, the test for causation articulated by the Third Circuit in *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991), adopted by the district court and affirmed by the Court of Appeals is a meaningless, attenuated standard which abrogates the redressibility aspect of standing.

It is a well-established principle that this Court is the ultimate and final arbiter of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Although divergence in views among the circuit courts is useful to help this Court focus on the precise issues at stake, once this Court has spoken and established the legal principle to be applied, circuit courts are not free to ignore them. This proposition is emphasized by Supreme Court Rule 10.1(c), which establishes as a standard for certiorari the failure to follow an applicable decision of this Court. Circuit courts may find new fact situations which justify a departure from a decision by this Court, or they may find distinguishable facts. But in either case, circuit courts are—and should be—required to account for and explain what they did and why they did it.

The Third Circuit's actions are not justified under the circumstances of the case. The district court clearly found standing based on principles that this Court has found inappropriate. The Third Circuit was obligated to either reverse or explain any circumstances which, in its view, justified deviation from this Court's edict.

B. The Court Of Appeals' Decision Renders Businesses Within The Third Circuit's Jurisdiction Competitively Disadvantaged And Discourages Businesses From Relocating To The Area.

Judge Aldisert, in his concurring opinion in *PIRG v. Powell Duffryn*, expressed a concern that citizen suit plaintiffs in Clean Water Act cases can sue simply because there is a permit violation:

> By enacting the Federal Water Pollution Control Act ("FWPCA"), especially the provisions that authorize any 'person or persons having an interest which is or may be adversely affected' to bring a suit 'against any person . . . who is alleged to be in violation of [a discharge permit],' Congress has expressed its enthusiastic support for the cleansing of our nation's waterways. *My concern is that this enthusiasm has led environmental organizations and citizen/plaintiffs to mistakenly believe they have standing to sue any time a discharge permit is violated.*

913 F.2d at 84 (citations omitted) (emphasis added).

The Court of Appeals' decision in this case effectively allows citizen suit plaintiffs to sue whenever there is a permit violation. The failure of the Third Circuit to acknowledge this Court's ultimate role in establishing legal principle is of great practical significance to *amici*. For example, relaxing standing requirements in a single circuit can have serious negative consequences on *amici*'s ability to compete. The Third Circuit's refusal to comply with this Court's rulings

causes *amici*'s members to suffer disadvantages unique to the geographical location within the circuit's jurisdiction. The action by the Third Circuit has created an uneven competitive "playing field" among *amici* located in the Third Circuit and *amici*'s national competitors in other circuits that do follow this Court's mandates. Further, this decision discourages process innovation and responsible environmental conduct in a global context, which also disadvantages *amici* competitively.

1. The Third Circuit's decision discourages process innovation.

The Third Circuit's decision will discourage businesses such as *amici*'s member companies from developing innovative technology because it is often difficult to predict precisely what discharge parameters will be necessary when applying for a NPDES/NJPDES permit. Because of the nature of innovations, "technical" but otherwise harmless discharge permit violations are bound to occur. Under the Third Circuit's ruling, technical permit excursions will subject companies to extensive liability regardless of whether the violations are intentional or cause harm to plaintiffs or the environment.

Further, the Third Circuit's decision will make the environmental permitting process more complicated and costly since companies will be forced to determine with absolute certainty what permit parameters should be in order to avoid extended litigation in circumstances where accuracy is impossible. Businesses within the Third Circuit will also be prejudiced in that they are potentially subject to massive penalties of up to $25,000 a day under the Clean Water Act for such technical violations.

33 U.S.C. §1319(d). Prevailing parties are also entitled to attorneys' fees under the Act. 33 U.S.C. 1365(d).[2]

New Jersey is at the forefront of research and development in pharmaceutical, robotics, telecommunications and biotechnology. Therefore, *amici* believe there must be a regulatory climate that creates incentives to build and maintain a skilled technical work force and expand existing research and development facilities as well as establish new ones. However, the Third Circuit's ruling is inconsistent with those objectives and will actually have the opposite effect of discouraging any new and innovative processes which puts companies at a competitive disadvantage both nationally and internationally.

The Third Circuit's ruling will discourage businesses from relocating to areas within its jurisdiction. This will adversely effect the overall economy of the region. Moreover, many companies have already left New Jersey, taking thousands of jobs out of state. This is exacerbated by the fact that the permitting process is more difficult than it would be in another location where companies' survival is not threatened by enormous penalties as a result of technical permit excursions. Companies must now take into consideration the fact that they cannot necessarily avoid being subjected to enormous liability because, even if they are able to predict process discharge parameters with relative certainty, it is not always possible to predict natural occurrences. This is precisely what happened to Petitioner. Petitioner could not predict, for example, that the temperature would be higher than is normal for

[2] 33 U.S.C. §1365(d) states in pertinent part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

certain periods of the year and that, therefore, temperature excursions would result. Moreover, Petitioner could not predict that geese would inhabit its storage ponds and cause increased levels of total organic carbon ("TOC").

This case illustrates, perhaps better than most, that enthusiasm to protect the environment is still far ahead of an understanding of the environment and its complexity. It also illustrates that rules made with the best of intentions must be flexible enough to allow for subsequent knowledge and that insistence on the pre-eminence of the rules can have a negative environmental impact as well as a negative impact on business.

In this case, the excursions at issue—organic carbon from migrating Canadian geese, thermal impact from the sun, and momentary salt excursions—are all testimony to nature's unpredictability notwithstanding the best efforts of man. Both the TOC from the geese and the "thermal load" from the sun were unrelated to plant manufacturing processes and would have occurred in an equivalent wetland settling had the plant not been involved.

Similarly, the salt excursions and reporting anomalies all were caused by the unpredictability of nature. The salt excursions were due to the inability to predict the variability of a 30 square mile drainage area often days after the discharge event; the reporting violations related to the inability to precisely predict when excursions occurred. The excursions and violations were not substantial. Indeed, it was stipulated between the parties that the salt excursions had *no* environmental impact based on a Limnology Study of the receiving waterway. The reporting violations were a technical matter that never deprived the regulators of the information they required.

All of these violations illustrate two essential points. First, the ecosystem is complex, well beyond man's ability to accurately predict. Second, that prosecutorial discretion on behalf of the regulators is essential for businesses to exist in this environment. In a highly competitive international business climate, innovation in terms of both process and environmental improvement is essential to survival. Allowing unaffected and unharmed individuals to sue for exceedingly large sums of money undercuts any relationship between government and business that otherwise encourages innovation.

It is clear from the numerous disclosures made to the New Jersey Department of Environmental Protection and Energy ("NJDEPE") by the Petitioner concerning the nature of the excursions, that the NJDEPE had elected not to prosecute Petitioner for the technical violations until recently when a public relations campaign initiated by Respondents caused the NJDEPE to take an enforcement role. Nonetheless, the NJDEPE's enforcement actions were tempered by the "reality" of these excursions—finding them to be "unintentional" and imposing a limited civil penalty.

As this Court has said, the primary role of the judiciary is to protect individual rights:

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.

Marbury v. Madison, 5 U.S. at 170. This conclusion was, in *amici*'s view, reached for two reasons: the essential separation of powers, and the fact that courts are often ill-equipped to make the complex policy choices which the executive must make and for which it is ultimately responsible to the electorate. Permitting standing without "injury in fact" as the Third Circuit has done in this case thrusts the Courts into the role of executive

policy making and threatens, as this case illustrates, to substantially disadvantage *amici*'s national and international competitive positions.

Further, there is no cost/benefit relationship for businesses as a result of citizen suits where there is no real injury stemming from permit excursions. Businesses may be more inclined to locate to the area if citizen suit litigation produced some corresponding environmental benefit. However, under the Third Circuit's standard which does not include injury in fact or redressibility requirements, business and industry are faced with the burden of increased litigation and massive penalties without any improvement to the environment. Therefore, requiring citizen suit plaintiffs in the Third Circuit to establish an injury in fact makes good business sense and good environmental sense.

2. The Third Circuit's decision discourages improvements to the environment.

Tragically, citizen suit plaintiffs who seek redress without injury generally are not concerned about harm to the environment. Often, such plaintiffs have a less than meritorious ulterior motive. As Judge Aldisert noted in *Powell Duffryn*, these plaintiffs create the lawsuit then look for plaintiffs:

> I see PIRG and FOE in the position of the old-time vaudeville performer's ad in Variety: 'Have tux, will travel.' PIRG and FOE advertised: 'Have case need live-bodied members/plaintiffs.'

Powell Duffryn, 913 F.2d at 84. The reason is that injury to the environment is not the driving force behind the litigation. Instead, it is the generation of visibility for the organization, the competition for dwindling sources of revenue, and the ability to get legal fees for their law firms. When injury in fact and redressibility are deleted from the requirements for standing, these other motives predominate and tragically, as this case illustrates, concern for the environment comes in last, if at all.

There is a clear national policy promulgated by the Department of Agriculture to encourage the development of wetland habitats for migratory water fowl. *See, e.g.*, Water Bank Act, Public Law, 91-559 and 96-182. Petitioner's effluent storage ponds are—albeit inadvertently—now serving that very purpose. In addition, they are doing it in a way that avoids nuisance to the public, without any showing of harm to anyone. Respondents seek to have this habitat destroyed by arguing that Petitioner should have netted or roofed the effluent storage ponds, or used high volume noise devices to scare the geese away. Is that really in the public interest or that of the environment? Nonetheless, it is how Respondents are trying to make their case for civil penalties and legal fees and the court is being asked to make policy choices that should be the province of the executive.

In fact, Alcan Aluminum Corporation, which is an affiliate of Petitioner, developed novel wetland treatment areas at its Oswego, New York plant and at its Logan, Kentucky operation. The Oswego facility developed a nature trail in the wetlands area that is the biological processing area for its oil emulsion. The Oswego facility would be a similar source of TOC from migratory water fowl and such projects would be discouraged by suits such as these despite the environmental benefits.

C. This Court Should Grant Petitioner's Writ Of Certiorari Because A Standing Doctrine Without An Injury In Fact Requirement Undercuts A Working Relationship Between Business And Government.

In *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), this Court reaffirmed the principle that the core of the constitutional standing requirement is injury in fact. The standing requirement is a limitation upon the congressional ability to confer standing, not upon the courts, since the courts do not have such authority.

Justice Scalia has argued that this is the "premise" upon which our system operates. *See* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983).

It is *amici*'s contention that government agencies rather than citizen suit plaintiffs provide the appropriate mechanism to make the policy choices necessary for the administration of sophisticated environmental laws and regulations. This is well illustrated by the facts in this case, where standards initially set with the best of intentions have through time become irrelevant in certain respects. As technology develops at an even greater pace, the regulator and the regulated must develop even greater flexibility. The adversarial system by its nature, and the courts by training and limitations in scientific expertise, are simply unable to respond to changes with the rapidity required. Moreover, allowing courts to become formulators of public policy removes the policy formulation from accountability to the electorate.

Does this mean that under certain circumstances laws may be unenforced or underenforced? The answer is yes, as Justice Scalia noted:

> The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.

Id. at 897. Prosecutorial discretion is especially important when, as here, technical permit violations cause no harm.

1. Businesses need a predictable relationship with government because they need to know who is setting policy.

The injury in fact standard is a needed restriction on who may sue since it dramatically reduces the universe of potential plaintiffs to a factually distinct group of potential litigants. Moreover, where there is injury in fact, there may be redressibility. Absent these limits, businesses are exposed to an unlimited pool of potential plaintiffs whose injuries, if they exist at all, are unrelated to businesses' actions. The net result, is to undercut businesses' relationship with government.

Government agencies charged with enforcing the laws often have long-term contact with those portions of the private sector. Through this mechanism, mutual expectations are developed and understood so the regulator's behavior corresponds to the regulated's expectations. As referenced with respect to Sunday blue laws, failure of the executive to enforce certain elements of a statute has the normal and expected consequence of encouraging the conduct. Where, as in this case, the failure to enforce the regulations is supported by data explaining that the excursions were anomalies and harmed no one, the normal consequence would be for the regulated to develop a level of confidence that this problem is not a priority requiring attention and will be addressed through the permit renewal process.

Lawsuits like this one shatter that process. The flexibility in the enforcement process is eliminated, and a virtual universe of potential plaintiffs must be viewed as being in equivalent policy formulating positions which undercuts prosecutorial discretion.

2. Permitting standing without injury in fact permits policy to be formed by persons other than those responsive to the electorate.

The standard of injury in fact permits individual redressibility when one is injured. It protects the minority's rights when the majority decides forbearance is in its interests. However, permitting a party to sue when uninjured undercuts the fundamental notion of majority rule by permitting an uninjured minority to impose its will on a majority disinclined to act. Such results not only stand the notion of majority rule on its head, it also raises the specter that minority rule has always had at its root—a potential that the real objective of the minority is not the overall interests of the group but the individual interests of the minority. This case and *Powell Duffryn* both illustrate the abuse to which a minority rule doctrine can lead.

If the majority has chosen not to act in its own interest and an uninjured minority chooses to act, the obvious question is "why?" It certainly cannot have the majority interest at heart, nor can it be credibly argued that the minority and the courts can better choose what is in the best interests of the majority. The simple reason is that the minority is acting in its own interests and those interests may well be at cross-purposes with the interests of the majority. This case represents that fact and portends for *amici* and their members a potential deluge of litigation the real objective of which is legal fees, not the environment or redress of injury.

Both *Powell Duffryn* and this case illustrate the plaintiffs' strong desire to use the system to generate legal fees. In this case, for example, Respondents requested attorneys' fees and expenses in excess of $41,000 pertaining only to the interlocutory appeal to the Third Circuit. The Third Circuit reduced that amount by 50% after Petitioners filed a response arguing that Respondents' fee request was excessive and

unreasonable. Respondents subsequently requested a panel rehearing of their application for attorneys' fees and expenses which was denied.

In *Powell Duffryn*, the same plaintiffs were represented by the same law firm and requested attorneys' fees and expenses in the amount of $503,501.72. In support of their fee application, PIRG submitted a 72 page brief, and subsequently filed a 115 page reply brief with a motion to submit an over-length brief. As the United States District Court for the District of New Jersey said, "[t]hese submissions amply demonstrate, to put it charitably, the unbridled exuberance with which PIRG prosecutes their many actions." *PIRG v. Powell Duffryn*, No. 84-340 (D.N.J. April 23, 1991). The court also recognized that plaintiffs' firm has a "reputation for professionally prosecuting environmental cases on a wholly contingent basis . . ." *Id.* The district court decreased the amount requested by almost 50%, stating that many categories were excessive and unreasonable.

As time has progressed, companies are becoming more and more sensitive to their environmental responsibilities. A large part of *amici*'s efforts are devoted to environmental activities. As a consequence, companies are active in ways that are dramatically reducing activities that cause injury. Nonetheless, the more sophisticated the measuring techniques, the greater the attempts to match discharge limits to the variability of nature, the more complex production systems and the greater the change occurring because of the need to innovate, the more likely that anomalous types of excursions will occur. With the disappearance of the "bad polluter", law firms such as Respondents', which are economically dependent on the existence of the "bad polluter", have a greater incentive to bring lawsuits for the potential revenues. The levels of the fee requests in this case and *Powell Duffryn* illustrate the economic reality behind this litigation. Without injury in

fact as a restraint, *amici* are concerned that environmental litigation of this sort driven by fee awards alone—"bring the suit find the plaintiff" in Judge Aldisert's terms—will become the order of the day. It will disrupt businesses' relationship with government and subvert the notion of majority rule.

D. The Third Circuit's Environmental Group Exception To Article III's "Irreducible Constitutional Minimum" Threatens The Longstanding Doctrine Of Associational Standing.

This Court has long held that the doctrine of associational standing is premised, among other things, on the ability of individual members of the association to independently demonstrate that they have standing in their own right. More than twenty years ago, the Court held that "[i]t is clear that an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Three years later, in *Warth v. Seldin*, 422 U.S. 490, 511 (1975), the Court reaffirmed that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." In doing so, the Court stated certain conditions an association must satisfy in order to proceed with a lawsuit on behalf of its members. *Id.* In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), the Court reiterated those conditions, as "prerequisites to 'associational standing,' " in the form of the following test:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

The rationale for associational standing is that the association acts merely as an extension of its individual members who have standing to sue in their own right. The relationship between the association and its membership requires a demonstration of individual standing before an association can assert its members' rights. As a result of this symbiotic relationship, any reduction in standing requirements for individual members necessarily makes it easier for the association to advocate on their behalf.

The Third Circuit's refusal to scrutinze individual allegations for immediate or threatened injury in fact substantially reduces the showing an individual must make in order to file a citizen suit under the Clean Water Act. This effectively creates an environmental group exception to Article III's rigorous standing requirements that gives groups like PIRG and FOE—which have no standing in their own right—an unconstitutional free ride to bring a citizen suit. Mere allegations of permit violations without any accompanying showing of actual harm cannot substitute for the demonstration of individualized injury required by this Court.

The Third Circuit's creation of an environmental group exception to Article III is supported neither by the Congress—which has no authority to enable persons who have not suffered a concrete harm to file suit in federal court—nor the Constitution, which demands compliance with Article III from all plaintiffs regardless of whether they are seeking individual or associational standing.

III. CONCLUSION

For all of the foregoing reasons, *amici* respectfully urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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April 2, 1993

Kenneth H. Mack, Esquire
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Re: *PIRG v. MEI*

Dear Mr. Mack:

This letter will confirm that counsel for Petitioner, Magnesium Elektron, Inc., consents to the filing of a brief *amici curiae* by the Chemical Industry Council of New Jersey and the New Jersey Chamber of Commerce.

Very truly yours,

/s/ LAWRENCE A. SALIBRA, II
Lawrence A. Salibra, II
Senior Counsel

LAS:iy

Supreme Court, U.S.
F I L E D
APR 14 1993
OFFICE OF THE CLERK

No. 92-1516

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MAGNESIUM ELEKTRON, INC.,

Petitioner,

v.

PUBLIC INTEREST RESEARCH GROUP
OF NEW JERSEY, INC. and
FRIENDS OF THE EARTH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Date: April 14, 1993

BEST AVAILABLE COPY

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MAGNESIUM ELEKTRON, INC.,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the Petition for a Writ of Certiorari. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondents has declined to grant her consent to the filing. Accordingly, this motion is necessary.

WLF is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes

a substantial portion of its resources to advancing the interests of the free-enterprise system. In particular, WLF is interested in promoting the certainty, predictability, and financial stability of business interests. WLF believes that these indicia of a properly operating free-enterprise system are threatened by undue judicial interference with the actions of the elected branches of government. To that end, WLF has appeared on numerous occasions as *amicus curiae* before this Court as well as other federal and state courts, asserting the necessity for strict adherence by the federal courts to the principle of separation of powers. *See, e.g., Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990); *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992).

WLF is concerned that the decision below is yet another effort by the lower federal courts to usurp the authority of the executive branch of government. The federal courts exceed their authority when they reach out to decide cases brought by plaintiffs who have suffered no real injury -- but who wish to second-guess the executive branch's enforcement of federal law.

WLF believes that its brief may be of assistance to the Court in deciding the issues raised in this Petition. WLF brings to this case a perspective that differs from that of any of the parties. It has no financial and/or administrative stake in the outcome of this action; it is filing solely out of a desire to assist the Court in arriving at a proper resolution of the issues raised.

For all the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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Counsel for *amicus*

April 14, 1993

QUESTION PRESENTED

Whether a plaintiff suing under the "citizen suit" provision of the Clean Water Act adequately demonstrates standing to sue an entity that violates a Clean Water Act discharge permit, where the plaintiff demonstrates that the violation "contributes" to the "kind of injuries" alleged by the plaintiff but does not demonstrate that the violation actually injured him.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation are set out fully in the motion for leave to file accompanying this brief.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby adopts by reference the Statement of the Case contained in the Petition for Writ of Certiorari.

In brief, Petitioner Magnesium Elektron, Inc. ("MEI") operates an industrial plant in Flemington, New Jersey that produces zirconium compounds used in various applications, including antiperspirants. The plant's principal waste product is a nontoxic, salt-water effluent, similar to natural sea water.

MEI holds a permit, issued pursuant to the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. §§ 1251 *et seq.*, that authorizes MEI to discharge limited amounts of its salt-water effluent into the nearby Wickecheoke Creek. The water from the creek ultimately flows into the Delaware and Raritan Canal (the "Canal") and the Delaware River.

MEI's discharge permit requires MEI to monitor its discharges and to report its findings on a monthly basis to the New Jersey Department of Environmental Protection ("NJDEP"). MEI has stipulated that, on various occasions between 1984 and 1989, its effluent discharges exceeded limitations imposed under its discharge permit. On each such occasion, MEI voluntarily reported its permit violations to NJDEP.

Respondents Public Interest Research Group of New Jersey, Inc. ("PIRG") and Friends of the Earth ("FOE") are non-profit organizations that, among other things, seek to ensure that companies issued Clean Water Act discharge permits strictly comply with permit requirements. After reading the MEI reports to NJDEP -- in which MEI admitted various minor violations of permit requirements -- Respondents filed suit against MEI in federal district court based on those violations. Respondents invoked the "citizen suit" provision of the Clean Water Act, 33 U.S.C. § 1365, which permits "any citizen" to file a civil action on its own behalf against "any person" alleged to be in violation of: (1) a Clean Water Act effluent standard or limitation; or (2) an order issued by a state or the federal government with respect to such standard or limitation.

Respondents' suit also alleged that MEI violated its discharge permit by failing to conduct all required monitoring and to submit all required reports.

Respondents alleged that several of their members had been injured by MEI's permit violations. Those members contended, *inter alia*, that they avoid drinking water and eating fish from the Canal because they fear ill-effects on their health from "contaminants" discharged into the Canal; that their enjoyment of the recreational benefits of the Canal is reduced by their knowledge that the Canal contains "pollutants"; that the discharge of pollutants into the Canal threatens aquatic life; and that their right to take action to prevent violations of the Clean Water Act was diminished by MEI's failure to comply with all monitoring and reporting requirements. *See* Petition Appendix ("Pet. App.") A35-A47.

On February 28, 1992, the district court granted partial summary judgment to Respondents on the issue of liability and issued a permanent injunction against further effluent discharges by MEI into the Wickecheoke Creek. Pet. App. A30-A31. The district court also granted Respondents' motion for a declaration that they had standing to file their action. *Id.* In granting that motion, the court denied MEI's request for an evidentiary hearing on the question of standing.

In determining that Respondents had standing to sue, the district court applied the test for standing in Clean Water Act cases adopted by the United States Court of Appeals for the Third Circuit in *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991). *See* Pet. App. A13. Under *Powell Duffryn*, a plaintiff can establish (for standing purposes) that his injury is "fairly traceable" to a Clean Water Act violation by demonstrating that a defendant has:

> (1) discharged some pollutant in concentrations greater than allowed by its permit

(2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that

(3) this pollutant causes or contributes to the kind of injuries alleged by the plaintiffs.

Powell Duffryn, 913 F.2d at 72.

Relying on *Powell Duffryn*, the district court found that Respondents had standing to sue because they had suffered cognizable injuries that were "fairly traceable" to MEI's permit violations and that were "likely to be redressed by a favorable decision." Pet. App. A8-A15. The district court went on to grant summary judgment to Respondents on the issue of liability and to issue a permanent injunction against continued effluent discharges. Pet. App. A17-A29.[1]

MEI appealed the district court's February 28, 1992 judgment to the Third Circuit, which affirmed the judgment (apparently relying on *Powell Duffryn*) in a two-sentence order issued December 15, 1992. Pet. App. A1-A2. After the Third Circuit denied rehearing on January 8, 1993 (Pet. App. A32-A33), MEI timely filed its Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

This case raises an issue that has arisen with increasing frequency in recent years -- who has standing to sue Clean Water Act permit holders found to be in

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[1] Although MEI holds a permit that expressly authorizes it to discharge effluent into Wickecheoke Creek, the district court apparently felt that to permit continued discharges would create too great a risk that MEI would again violate discharge limitations. Pet. App. A27-A28. As a result, MEI now hauls its effluent to the Trenton Sewer Authority, which treats the effluent and then discharges it into the Delaware River at a point *upstream* from the Wickecheoke Creek.

violation of their permits? The eagerness with which plaintiffs bring "citizen suits" against permit holders who admit violations is easily explainable: a pot of gold (in the form of attorney fees awardable under 33 U.S.C. § 1365(d)) awaits anyone who substantially prevails in a citizen suit brought to enforce the Clean Water Act.

Almost inevitably, success in such citizen suits turns on whether the plaintiff can establish standing to sue, because a permit holder who has already admitted a permit violation -- in required monitoring reports filed with government authorities -- will usually have few other bases for contesting liability.

Given the frequency with which the standing issue arises and the enormous potential liability faced by permit holders in such Clean Water Act cases, the issue of who has standing to enforce the Clean Water Act is of tremendous importance to the business community.

Moreover, the standard adopted by the Third Circuit for deciding standing issues in Clean Water Act cases (a standard that has now been adopted by at least two other circuits) is in direct conflict with recent decisions of this Court. Guidance from the Court is urgently needed to correct the Third Circuit's erroneous understanding of standing doctrine, before the entire Clean Water Act enforcement mechanism is thrown into disarray.

I. THE ISSUE OF HOW COMPLIANCE WITH CLEAN WATER ACT PERMIT REQUIREMENTS IS TO BE ASSURED IS A MATTER OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

The Clean Water Act, adopted by Congress in 1972, has had a significant impact on virtually every industrial enterprise in this country. The Act prohibits the discharge of any "pollutant" (defined broadly to include virtually any substance other than pure water) into virtually any waterway, except pursuant to a government-issued

discharge permit. 33 U.S.C. § 1311. As a result of that requirement, businesses have been required to obtain literally hundreds of thousands of discharge permits in order to continue even those discharges with minimal effect on water quality. Those permits, which place strict limits on total discharges, in turn require businesses to monitor their discharges and report their findings to state and/or federal authorities.

The Clean Water Act provides stringent enforcement mechanisms. The U.S. Environmental Protection Agency ("EPA"), as well as state officials, are authorized to seek injunctive relief against permit violators and to assess civil penalties. 33 U.S.C. § 1319. Violators are also subject to severe criminal penalties. 33 U.S.C. § 1319(c).

Congress also provided for enforcement by means of "citizen suits" brought by anyone injured by a permit violation (33 U.S.C. § 1365), and -- to induce injured private citizens to file suit -- provided for attorney fee awards to prevailing plaintiffs. 33 U.S.C. § 1365(d). But, as this case well illustrates, unless some reasonable limitation is placed on who qualifies as an "injured" citizen entitled to sue under the "citizen suit" provision, the financial burden on Clean Water Act permit holders will be far more onerous than anything contemplated by Congress.[2]

The nature of the Clean Water Act permitting system eliminates from "citizen suits" most of the costs and risks that normally are faced by citizens contemplating a lawsuit. Since permit holders must monitor and report their discharges to state and/or federal authorities, citizens monitoring such reports can quickly determine when a permit violation has occurred simply by comparing the

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[2] In light of the threat of federal government civil and criminal enforcement actions faced by all permit holders, there is little danger that tightening the Third Circuit's "citizen suit" standing requirements would result in increased violations of discharge limitations imposed Clean Water Act permits.

reports to the terms of the permit. Permit holders are in no position to deny such evidence of violations, since it is their own reports that demonstrate the violations.

Groups such as Respondents have made a cottage industry out of monitoring reports filed by Clean Water Act permit holders and then bringing "citizen suits" against permit holders admitting to violations -- even when (as here) the violations cannot be termed anything other than "technical" violations. Indeed, Respondent PIRG was the plaintiff in *Powell Duffryn*. In New Jersey alone, other recent PIRG "citizen suits" following that same pattern (and which were not settled prior to a reported decision) include *Public Interest Research Group v. Yates Industries*, 757 F. Supp. 438 (D.N.J. 1991); *Public Interest Research Group of New Jersey v. Witt Chemical Corp.*, C.A. No. 89-3146, 1990 WL 66178 (D.N.J. 1990); *Public Interest Research Group v. GAF Corp.*, C.A. No. 89-2283 (D.N.J. 1990); *Public Interest Research Group of New Jersey v. U.S. Metals Refining Co.*, 681 F. Supp. 237 (D.N.J. 1987); *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*, 617 F. Supp. 1190 (D.N.J. 1985); *Student Public Interest Research Group v. Georgia Pacific Corp.*, 615 F. Supp. 1419 (D.N.J. 1985); *Student Public Interest Research Group of New Jersey v. Tenneco Polymers*, 602 F. Supp. 1394 (D.N.J. 1985); and *Student Public Interest Research Group of New Jersey v. Fritzsche, Dodge & Olcott*, 579 F. Supp. 1528 (D.N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985). Given the lucrative nature of such suits (in terms of the potential for significant attorney fee awards versus the minimal costs of proving a permit violation), PIRG and others can be expected to continue to bring a large number of such suits to the federal courts in the years to come. The financial impact of these suits on Clean Water Act permit holders cannot be overstated.

The key issue in virtually all of the cases cited above was whether the plaintiff had standing to sue. The Third Circuit has established extremely liberal standing requirements for such cases. In contrast, this Court's

recent decisions regarding standing in environmental cases suggest that establishing standing in such cases is not nearly so easy as the Third Circuit has indicated. *See* Section II, *infra*. In light of the recurring nature of the standing issues presented by this case, the Court should grant review in order to clarify the law in this area.

II. THE THIRD'S CIRCUIT'S STANDING REQUIREMENTS SERIOUSLY MISREAD THIS COURT'S TEACHINGS IN *LUJAN I* AND *II*

This Court had occasion in *Lujan v. Defenders of Wildlife [Lujan II]*, 112 S. Ct. 2130 (1992); and *Lujan v. National Wildlife Federation [Lujan I]*, 110 S. Ct. 3177 (1990), to revisit the circumstances under which a plaintiff is said to have "standing" to litigate alleged violations of federal law in the federal courts. The Court noted in *Lujan II* that Article III of the Constitution limits the jurisdiction of the federal courts to "Cases" and Controversies" and that the doctrine of "standing" has developed as a method of ensuring that federal courts do not ignore that limitation. *Lujan II* at 2136. The Court explained that the "irreducible constitutional minimum of standing" contains three elements:

> First, the plaintiff must have suffered "injury in fact" -- an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) actual and imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. (internal quotations and citations omitted).

The Court made clear that the doctrine of standing is grounded in separation-of-powers concerns, concerns that the federal courts not arrogate to themselves powers that properly belong in the political branches of government. *Id.* at 2144-2145. Moreover, federal courts are not justified in ignoring Article III constraints simply because they may have been invited to do so by Congress. *Id.* Thus, the Court held that Congress's insertion of a "citizen suit" provision in the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§ 1530 *et seq.*, did not in any way lessen the burden on a citizen bringing suit to enforce the ESA, to demonstrate that he met traditional standing requirements. *Id.* at 2145.

Moreover, the Court made clear that the requirements that the alleged injury be "particularized" and "actual," and be "fairly traceable" to the challenged action mandate that the plaintiff make a "factual showing of perceptible harm." *Id.* at 2139. Standing, the Court emphasized, is not "an ingenious academic exercise in the conceivable." *Id.*, quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). Thus, the Court said, a plaintiff has not suffered a legally cognizable injury where his alleged injury is based on "pure speculation." *Id.* at 2140.

The Court in *Lujan I* made clear that where a plaintiff fails to introduce sufficient facts to demonstrate his/her standing, it is improper for a federal court to "presume" the missing facts necessary to establish the injury that the plaintiff generally alleges. *Lujan I*, 110 S. Ct. at 3177. The Court noted that while generalized allegations of injury may be sufficient to withstand a Rule 12(b)(6) motion to dismiss for failure to state a claim, those generalized allegations must be supported by specific facts if the plaintiff is to continue through later stages of the litigation. *Id.* And if the case proceeds to trial, the plaintiff must demonstrate by a preponderance of the evidence the facts necessary to support his claim of standing. *Lujan II*, 112 S. Ct. at 2137.

The Third Circuit's standing requirements for Clean Water Act cases -- enunciated in *Powell Duffryn* and followed by the district court in this case -- are in clear conflict with the standing requirements set forth in *Lujan I* and *Lujan II*. The Third Circuit's standard is most deficient with respect to the requirement that the alleged injury be "fairly traceable" to the challenged action; the standard simply abandons all necessity of demonstrating that it was the *defendant's* permit violation (as opposed to someone else's similar effluent discharge, or to the defendant's *permissible* effluent discharge) that caused the injury. *Powell Duffryn* held that the "fairly traceable" requirement is met by demonstrating that a defendant has:

> 1) discharged some pollutant in concentrations greater than allowed by permit 2) into a waterway in which the plaintiffs have an interest that is *or may be* adversely affected by the pollutant and that 3) this pollutant causes or contributes to *the kinds of injuries* alleged by the plaintiffs.

Powell Duffryn, 913 F.2d at 72 (emphasis added). While the Third Circuit was undoubtedly correct in stating that "[a] plaintiff need not prove causation with absolute scientific rigor" in order to establish standing (*id.*), its holding that a plaintiff need show only that his interests "may" be adversely affected by the permit violation and that the violation contributes to the "kind" of injuries alleged by the plaintiff is in clear conflict with *Lujan II's* requirement of a "factual showing of perceptible harm." *Lujan II* at 2139.

The Third Circuit's unwillingness to adhere to strict causation requirements for standing in Clean Water Act cases appears to have been based on a realization of how difficult it is for a plaintiff to trace his alleged injury to a particular permit violation. Indeed, Judge Aldisert's concurring opinion in *Powell Duffryn* is quite candid in admitting that he was willing to find standing -- despite the inability of any plaintiff to trace his injury to the defendant's permit violations -- because of his belief that

the defendant was an unscrupulous actor who would escape unpunished in the absence of a finding of standing. *Powell Duffryn*, 913 F.2d at 83-89 (Aldisert, J., concurring). But *Lujan I* and *II* make clear that facts necessary to establish standing are never to be assumed, and they categorically reject Judge Aldisert's suggestion (*see Powell Duffryn* at 89) that "precepts of standing are perhaps expanded a bit when at stake are the great public policy considerations of insults to the environment."

Standing requirements were relaxed even more in this case than they were in *Powell Duffryn*. Even though Respondents were seeking summary judgment in *their* favor (and thus all disputed issues of material fact were to be resolved against them), the district court rejected out of hand MEI's claims that its permit violation caused no injury (Pet. App. A13) and even appeared to permit Respondents to meet "redressability" requirements based on mere *allegations* (Pet. App. A15) that they were injured by MEI's permit violations.[3]

Furthermore, the Third Circuit's overly liberal standing requirements in Clean Water Act cases cannot be dismissed as an aberration unlikely to be repeated elsewhere, and thus unworthy of the Court's attention. To the contrary, at least two other courts of appeals, the Fourth Circuit and the Fifth Circuit, have explicitly adopted *Powell Duffryn*'s faulty standards for establishing that injury is "fairly traceable" to the challenged conduct. *See Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992); *Save Our Community v. U.S. Environmental Protection Agency*, 971 F.2d 1155, 1161 (5th Cir. 1992).

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[3] The district court's finding of standing to contest MEI's violation of its monitoring and reporting duties is similarly in conflict with *Lujan II*. *Lujan II* made clear that a "procedural injury" (of the type asserted by Respondents as a result of MEI's violation of monitoring and reporting duties) generally does not constitute "injury-in-fact" sufficient to meet standing requirements. *Lujan II*, 112 S. Ct. at 2142-2146.

In sum, review of the decision below is warranted because that decision is in clear conflict with this Court's *Lujan I* and *II* decisions.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully submits that the Petition should be granted.

Respectfully submitted,

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